

## MPEA WEBINAR PART II – May 19, 2020

Andrea Welcome

Sarah Opens with Summary of Part I and Format for this Webinar

### 1. HISTORY OF THE MPEA [15 Minutes Max]

*Mark* – go through these Quickly [my memory isn't perfect on these as I don't have all my legal reference books at my home]

Prior Statutes (6 and 2 proposed):

- Municipal Planning Act (aka City or Village Planning Act, 1931 PA 285) – included cities, villages & townships; based on national model SCPEA (1928; whereas the SSZEA was first produced in 1922 and updated in 1924)
- Township Planning Act (1959 PA 168) – townships only (may have been based on a Wisconsin model)
- County Planning Act (1945 PA 282) – counties only (replaced earlier act in early 1930's)
- Regional Planning Act (1945 PA 281) – joint municipal planning or whole regions comprised of several counties
- Omnibus Planning Act – *proposed* by MI AIP Chapter in 1960's
- Coordinated Planning Act – *proposed* by MAP in 2000
- 5 year plan review and master plan intergovernmental coordination provisions added to 3 planning acts in 2003(?)
- Joint Municipal Planning Act (2003 PA 226) – planning and/or zoning for multiple jurisdictions
- MPEA (Act 33 of 2008) -

Important Observations:

- The important iterations of planning statutes *followed* the zoning enabling acts
- Connection between planning and zoning started weak but has been slowly getting stronger (both statutorily and by court cases)
- Zoning plan requirement has always been in the Municipal Planning Act, but not in the township and county acts
- Many other statutes reference planning enabling acts, or “master plan,” and authorize specialized studies (examples: HREA, Sand Dunes, urban redevelopment, etc.)
- 10 editions of **Michigan Laws Related to Planning** capture the evolution of these laws.

*Dick* –

Provisions in Article V: Transitional Provisions & Repealer:

- How the MPEA came about as synthesis of 3 planning enabling acts
- Legislative working group / process

### Important Observations:

- Not working the same way anymore, for the most part
- Still more attention being given to zoning (first), then planning, but...

*Sarah to add Color Commentary*

## **2. PURPOSE OF PLANNING, MASTER PLAN & RELATIONSHIP TO ZONING**

**[20 minutes max including questions from last session]**

*Dick –*

### Provisions in Article I and Article III related to purpose of planning & master plan

- PLANNING (I): General function (consistent historically) – guide / manage / (accommodate) growth and development for array of purposes
- Draws from general police powers delegated by state (consistent with zoning)
- Pretty broad and permissive
- Cannot close the doors and stop growth all together
- MASTER PLAN (II) – Article III: Preparation, components, process ~ Who, what, where, when, how, plus USE
  - Who – PC (maybe legislative body) – Address this more in a few minutes
    - In consultation with neighbors, interested agencies, local citizens (hearings)
  - What – Plan as policy guidance, based on scan of current conditions, current infrastructure, community goals, etc.
  - Where – Planning jurisdiction, maybe a bit beyond, maybe subareas / functions
  - When – Forward looking, ~ 20 year time frame, revisited regularly
  - How – Begin, consult, prep, consult, adopt, review/revise ...
- USE: Guiding regulation (zoning, subdivision), and infrastructure
  - Michigan is NOT a mandatory “consistency” state whereby all zoning (or infrastructure) decisions MUST be consistent with the master plan. Instead it is a state where the overall validity of zoning is statutorily tied to the master plan which must provide the legal basis for zoning; and where courts defer most readily to a municipality where there is evidence of statutory conformance, such as with zoning based on a plan and subsequent decisions made consistent with a plan.

*Mark –*

### Provisions in Article III related to relationship of master plan to ZONING

- MPEA Sec 3 (g)(ii) definition of master plan: *“Any plan adopted or amended under this act. This includes, but is not limited to, a plan prepared by a planning commission authorized by this act and used to satisfy the requirement of section 203(1) of the Michigan zoning enabling act, 2006 PA 110, MCL 125.3203, regardless of whether it is entitled a master plan, basic plan, county plan,*

*development plan, guide plan, land use plan, municipal plan, township plan, plan, or any other term.”*

- MPEA Sec 31(2)b requires planning commissions to: *“Consult with representatives of adjacent local units of government in respect to their planning so that conflicts in master plans and zoning may be avoided.”*
- MPEA Sec 33(2)a: *“If a county has not adopted a zoning ordinance under former 1943 PA 183 or the Michigan zoning enabling act, 2006 PA 110, MCL 125.3101 to 125.3702, a land use plan and program for the county may be a general plan with a generalized future land use map.”* Why? Because then the plan is not a master plan and does not have to be concerned with zoning, but all master plans do.
- MPEA Sec 33(2)d, the biggie: *“For a local unit of government that has adopted a zoning ordinance, a zoning plan for various zoning districts controlling the height, area, bulk, location, and use of buildings and premises. The zoning plan shall include an explanation of how the land use categories on the future land use map relate to the districts on the zoning map.”*
- MZEA: The term “master plan” does not appear in the MZEA, but:
  - Sec 203 of the MZEA states *“A zoning ordinance shall be based upon a plan designed to, \*\*\*\*”* and many of these purposes closely parallel and overlap those in the MPEA.
  - Until 2011, Sec 305 required that the zoning board or zoning commission had to prepare a zoning plan separate from the zoning ordinance (thereafter their power had to be transferred to the planning commission if it had not been previously transferred).
  - Sec 508 dealing with purchase of development rights says: *“The development rights ordinance provisions for the PDR program are consistent with the plan upon which the township, city, or village zoning is based.”*
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*Sarah Observations from Practice Point of View*

### **Questions & Answers**

**Q:** *I'd be interested in seeing where specifically there are places in the Act where there are still different requirements for cities, villages, and townships (e.g. when it says "municipal" does that mean only cities and villages? What is meant by "unincorporated portion" of a township?)*

**A:** [Dick]

- Distinctions remain in a handful of places – e.g., specific provisions for township planning commissions and ordinances (Sec. 13); numbers of planning commissioners – municipal vs. county (Sec. 15).
  - Do a word search for county, township, city village.
- Historically, ‘municipal’ = incorporated government (city or village, not township). But, by definition in the act, ‘municipal’ = village, city, and township.
- Incorporation refers to the existence of a legally autonomous unit of local government. Even though villages remains part of the township for some purposes (taxes, participation in township governance), they are enabled to

adopt their own plans. I would interpret 'unincorporated portion of the township' to mean that area of a township outside of both cities and villages.

**Q:** *There is no definition for "public utility" in the MPEA - who should we sent intent to plan notices to?*

**A:** [Mark] There are multiple steps to follow to answer a question like this:

1. First, look to the statute for guidance. Sec. 39 (2)f of the MPEA says: *"For any local unit of government undertaking a master plan, each public utility company, railroad company, and public transportation agency owning or operating a public utility, railroad, or public transportation system within the local unit of government, and any government entity that registers its name and mailing address for this purpose with the planning commission."*
2. Second, look to related statutes: the MZEA says in Sec. 306(2) with regard to rezonings: *"Notice of the time and place of the public hearing shall also be given by mail to each electric, gas, and pipeline public utility company, each telecommunication service provider, each railroad operating within the district or zone affected, and the airport manager of each airport, that registers its name and mailing address with the clerk of the legislative body for the purpose of receiving the notice of public hearing."*
3. Third, look to the definition in **Merriam - Webster's Dictionary**: *"a business organization (such as an electric company) performing a public service and subject to special governmental regulation."*
4. Fourth, as both statutes suggest, MAIL a letter to all entities in this list and locally meeting the definition and ASK THEM if they want to register to receive such notices. THEN, document your list and that you contacted them and create an easily discovered file to examine when the issue comes up again.
5. Fifth, later, if any entity meeting the definition of a public utility subsequently requests to receive such notices, add them to the list.
6. Last, note that **Wikipedia** gives a broader definition of public utility that covers all the above and more: *"A public utility company is an organization that maintains the infrastructure for a public service. Public utilities are subject to forms of public control and a regulation ranging from local community-based groups to statewide government monopolies."*

**Q:** *To your knowledge, have there been any cases of a legislative body rejecting a plan in Michigan?*

**A:** [Mark] I am not aware of any litigation on the subject, but there are plenty of instances in which there was significant disagreement between the legislative body and the planning commission on a draft master plan. Although most often, the governing body is indifferent. Usually to avoid such conflict the planning commission directly involves the governing body from the beginning in the master plan update. Later, if disagreement appears likely, the planning commission sends a draft of the plan to the legislative body for review and comment PRIOR to sending an adopted plan for their blessing. Some communities attempt to get the governing body to indicate clearly on the front end of the process whether they will or will not be adopting the master plan on the back end and then there is a serious discussion about the pros and cons (legally and

politically) about this prior to the governing body making a decision. Other community's by choice or necessity keep the decision open until the end. I suspect most governing bodies do not adopt the plan, but my preference as a consultant was always that they do, with a decision on the front end of the process as to that intent.

**Q:** *If a previous City Council did a resolution several years back, but those members are not are part of the legislative body anymore, does that resolution stand? Does the resolution have to be done when the Master Plan process begins?*

**A:** [Dick] In general, prior legislative bodies cannot bind future bodies, particularly with regard to things like resolutions (even ordinances can be amended; although contracts cannot be breached). So – Strictly speaking, the resolution probably stands if left unaltered, but a current council could rescind or amend it. (Pay attention to citizen expectations.)

**Q:** *We will be extending our current Masterplan due to Covid. Supposed to update this year. I'm new to the MPEA/MZEA (grad student here). Is equity or justice referenced in the act, if not, is it seemingly neglected or just implied?*

**A:** [Dick] There are no provisions within MPEA / MZEA that speak specifically to equity or justice, although they are both implied through constitutional protections. Nothing in the MPEA or MZEA would prohibit a locality from paying attention to those concerns explicitly in their plans and codes; I think the statutes are broad enough to enable it.

**Q:** *For 5 year MP review, if a city amended a MP map one or a few times, during the 5 years, does that satisfy the 5 year review; does it mean the Planning Commission doesn't have to formally take time after 5 years to make make a 5 year statement?*

**A:** [Mark] “No” to both questions. Sec. 45(2) of the MPEA requires a 5 year review by the planning commission of the master plan and a written determination of the review and its findings. Prior amendments would be among the findings to record as part of that review. There is no alternative mechanism provided for. Attorney's suing a municipality often check to determine whether this five year review is being faithfully executed and documented, and then often whether decisions being made under the zoning ordinance are consistent with the master plan. Failure to document this can result in unwanted allegations that may be hard to beat and the process to avoid such trouble is easy and clearly provided in Sec 45(2) of the MPEA.

**Q:** *Regarding the Master Plan. Are incremental MP supplements and amendments sufficient to fulfill the requirement of a periodic comprehensive MP effort? or no?*

**A:** [Mark] “No,” see the reply above.

**Q:** *We seek clarification under what circumstances in Section 125.3845 that the required review period is 42 days as opposed to 63 days.*

**A:** [Dick] The 63 day review period applies when a new plan is being proposed (including a comprehensive revision/update/replacement of a current plan); the 42 day plan applies if the action is an “extension, addition, revision, or other amendment” (i.e., something short of a new plan or comprehensive redo of an old plan); unless it's a clerical correction – then no notice is required.

**Q:** Right about the zoning plan - how does the zoning plan affect the actual zoning code of a municipality?

**A:** [Mark] Sec. 33(2)d says: "For a local unit of government that has adopted a zoning ordinance, a zoning plan for various zoning districts controlling the height, area, bulk, location, and use of buildings and premises. The zoning plan shall include an explanation of how the land use categories on the future land use map relate to the districts on the zoning map." It may be helpful to think of the zoning plan as the outline in the master plan for the zoning ordinance, with the most key basic provisions identified. For example, identify in the master plan all the districts to be included in the zoning ordinance and explain how they relate to the land use categories on the future land use map. Often they are not the same and this can create great confusion for property owners and developers. Also, including the proposed Schedule of Regulations in the master plan is a good way to further show this relationship and offer an opportunity to tie density and separation standards to other objectives in the master plan.

### **3. CIP, MASTER STREET PLAN, SUBDIVISION REGULATIONS [10 minutes max including questions from last session]**

*Mark –*

#### Provisions in Article IV related to CIP, Master Street Plans, and Sub Regs

- These provisions in Article IV are all modeled after the Standard City Planning Enabling Act of 1928, although they are not as comprehensively addressed in the MPEA as in that model.
- Public infrastructure approval. The Planning Commission has to approve any public property or building improvement before construction, but may be overruled by the administering public body in townships formerly under 1931 PA 285, by a 2/3 vote and in cities and villages and all other townships by a majority vote. PC has 35 days to respond to a request or the project is considered to be approved (a little different for counties). See Sec 61 (1) and (2).
- Annual CIP provisions in Sec. 65 are there to prevent problems that would accrue by independent entities not planning infrastructure improvements consistent with the master plan. Some cities, villages and counties have successfully used this model for decades, many never use it and all infrastructure planning is done by line agencies with approval by the governing body. The former get projects consistent with the master plan and longer term considerations, whereas the latter get projects consistent with political whims and shorter term considerations. CIPs are mandatory for PC to prepare unless the governing body exempts them from this provision; and townships without a public water supply or sewage disposal system do not have to prepare a CIP.
- Sub Regs, the PC has a major role in review and approval of proposed plats. The following provisions are in addition to those in the Land Division Act. Sec 71(2): "Recommendations for a subdivision ordinance or rule may address *plat design*, including the proper arrangement of streets in relation to other existing or

planned streets and to the master plan; adequate and convenient open spaces for traffic, utilities, access of firefighting apparatus, recreation, light, and air; and the avoidance of congestion of population, including minimum width and area of lots. The recommendations may also address the extent to which streets shall be graded and improved and to which water and sewer and other utility mains, piping, or other facilities shall be installed as a condition precedent to the approval of a plat.”

- “(3) Before recommending an ordinance or rule described in subsection (1), the planning commission shall hold a public hearing on the proposed ordinance or rule. The planning commission shall give notice of the time and place of the public hearing not less than 15 days before the hearing by publication in a newspaper of general circulation within the local unit of government.
- (4) If a municipality has adopted a master plan or master street plan, the planning commission of that municipality shall review and make recommendations on plats before action thereon by the legislative body under section 112 of the land division act, 1967 PA 288, MCL 560.112.”
- (5) A planning commission shall not take action on a proposed plat without affording an opportunity for a public hearing thereon. A plat submitted to the planning commission shall contain the name and address of the proprietor or other person to whom notice of a hearing shall be sent. Not less than 15 days before the date of the hearing, notice of the date, time, and place of the hearing shall be sent to that person at that address by mail and shall be published in a newspaper of general circulation in the municipality. Similar notice shall be mailed to the owners of land immediately adjoining the proposed platted land.
- (6) A planning commission shall recommend approval, approval with conditions, or disapproval of a plat within 63 days after the plat is submitted to the planning commission. If applicable standards under the land division act, 1967 PA 288, MCL 560.101 to 560.293, and an ordinance or published rules governing the subdivision of land authorized under section 105 of that act, MCL 560.105, are met, the planning commission shall recommend approval of the plat. If the planning commission fails to act within the required period, the plat shall be considered to have been recommended for approval, and a certificate to that effect shall be issued by the planning commission upon request of the proprietor. However, the proprietor may waive this requirement and consent to an extension of the 63-day period. The grounds for any recommendation of disapproval of a plat shall be stated upon the records of the planning commission.
- (7) A plat approved by a municipality and recorded under section 172 of the land division act, 1967 PA 288, MCL 560.172, shall be considered to be an amendment to the master plan and a part thereof. Approval of a plat by a municipality does not constitute or effect an acceptance by the public of any street or other open space shown upon the plat.”
- Not many Michigan communities have Master Street Plans (as provided in Sec 71). This is a potent planning tool in growing jurisdictions where growth will

require new roads. It usually focuses on minor and major arterials and their connections with major existing or proposed elements of the state trunkline system. It is usually implemented as part of the plat review process. There are legal issues associated with mandatory dedications, road financing and takings, and such Master Street Plans need to be carefully prepared with assistance from legal counsel. This power has significant limitations as noted below:

- Sec 33(3): *“If a master plan is or includes a master street plan or 1 or more elements described in subsection (2)(b)( i), the means for implementing the master street plan or elements in cooperation with the county road commission and the state transportation department shall be specified in the master street plan in a manner consistent with the respective powers and duties of and any written agreements between these entities and the municipality.”* [Pursuant to Sec 41(2)g those two entities also have to receive notice that a master street plan will be prepared.]

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*Dick* Observations:

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*Sarah* Observations from Practice:

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### Questions & Answers

**Q:** *We have had a few subdivisions recently. Our zoning requires site plan review for subdivisions.*

**A:** [Mark] Presumably the unstated question behind that statement is, *“Is that adequate.”* The answer is *“no.”* The Land Division Act, PA 288 of 1967 (formerly known as the Subdivision Control Act, and as significantly updated by PA 591 of 1996), provides in Sec. 105, that *“a preliminary or final plat shall be conditioned upon compliance with all of the following: \*\*\* any ordinance or published rules of a municipality or county adopted to carry out the provisions of this act.”* Most communities have a separate subdivision control ordinance that addresses all the specifics related to the standards for a plat, and that ties back to the zoning ordinance with regard to district lot dimensions, access requirements, and related zoning requirements. Most plats are processed pursuant to the local subdivision control ordinance procedure and there is no separate site plan review under the zoning ordinance for the plat, as a plat is not a land use, it is a land division. Of course, the plat would not be approved if it did not meet the lot requirements as laid out in the zoning ordinance (as is provided in the subdivision control ordinance).

**Q:** *Amy, in conjunction with subdivision review under MPEA, would be helpful to discuss both the subdivision act (plat/land divisions) AND condominium law as some developers are using this to circumvent plat process.*

**A: [Mark]** There is no mention of “condominiums” in the MPEA. MAP attempted to get a reference to the Condominium Act in the MPEA in 2006 without success. The Condominium Act, PA 59 of 1978, regulates a form of ownership, not a building or use type, and so-called “site condos” while they look like a plat in many respects (and are called “condominium subdivisions”), are not considered divisions of land since different areas of a condominium project have different ownership interests (e.g. common versus exclusive or undivided ownership). While site condos have become very common in Michigan over the last 20 years, they are a statutory interpretation. I am unfamiliar with any litigation that concluded site condos were a “*subdivision in disguise*” and hence subject to the Land Division Act, since the Condominium Act specifically provides for condominium subdivisions. Communities may, and usually do have condominium regulations in the zoning ordinance, but such regulations must be narrowly drafted to not interfere with, or attempt to regulate more strictly, standards that are in the Condominium Act. While condominiums are not specifically included in the MPEA, that does not preclude communities from addressing them in the master plan. It is a good idea to do so, if for no other reason than to provide another legal basis for regulating them, similar to land divisions. While the Condominium Act provides detailed provisions for creating condominium projects and condominium subdivisions, it does not provide explicit local authority for regulating them, which is why they are typically addressed by either a separate local police power ordinance, or by local zoning provisions, or both. Cannot treat condominiums different than a regular subdivision (Cathrine Kaufman).

#### **4. WHY THE PLANNING COMMISSION IS STRUCTURED THE WAY IT IS [15 minutes max including questions from last session]**

*Dick:*

##### Provisions in Article II related to Planning Commission Creation & Administration

- HISTORY of planning (including planning via zoning) – SSZEA / SCPEA
  - Need to combine both *technical expertise* (beyond what elected officials might bring to the table) w/ *adequate representation of interests* (beyond what technical experts might bring to the table)
  - Numbers and representational requirements reflect that history
  - AS a public entity, need to follow appropriate process (meetings, compensation, etc.)
- IN Michigan: PC is not a legislative body, and the plan itself is not legally enforceable; so PC = counselor to elected officials on legislative, maybe administration decisions (or maybe sometimes admin decision-makers, depending on terms of locality’s ordinances)

*Mark Observations:*

- Importance of annual report and inclusion of zoning report within it.
  - “A planning commission shall make an annual written report to the legislative body concerning its operations and the status of planning activities, including recommendations regarding actions by the legislative body related to planning and development.” (Sec. 19(2)(2) in MPEA)

- *“Following the enactment of the zoning ordinance, the zoning commission shall at least once per year prepare for the legislative body a report on the administration and enforcement of the zoning ordinance and recommendations for amendments or supplements to the ordinance.”* (Sec 308(2) in MZEA)
- Importance in general of documentation and good filing

*Sarah Observations from Practice:*

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### Questions & Answers

**Q:** *Will you remind me - how many commissioners can live outside our city limits - our population is 2,400 and we have 7 on the commission.*

**A:** [Dick] 2 (combining Sec. 15(2) and 4(b))

**Q:** *Can a non-resident member of a PC also be a non-electror (a non-citizen of the US)?*

**A:** [Dick] Sec. 15(4) reads:

- *“Members of a planning commission shall be qualified electors of the local unit of government, except that the following number of planning commission members may be individuals who are not qualified electors of the local unit of government but are qualified electors of another local unit of government”*

My reading of the statute is that a non-electror (non-citizen) cannot be a member of the PC, whether residing in the locality or outside of it.

**Q:** *Has there been any consideration to amending the MPEA to prohibit ex parte communications (i.e. communications with Commissioners by applicants or interested parties concerning an application outside of the public hearing)? Such was done by Illinois in the wake of the Klaeren case, and it has helped ensuring transparency as well as protect Commissioners.*

**A:** [Mark] MAP attempted to include prohibition of ex parte communications in the MPEA in 2008. However, as I recall, there was not uniform agreement as to what was included in ex parte communications, and wide variation in how municipalities deal with them. As a compromise, every planning commission is required to have bylaws and there are seven references to them throughout the MPEA. Bylaws are required in Sec. 19 (1): *“A planning commission shall adopt bylaws for the transaction of business, and shall keep a public record of its resolutions, transactions, findings, and determinations.”* There is no restriction in the MPEA as to what goes into bylaws, so a community could, and many do, address ex parte communications in planning commission bylaws. The topic is also addressed in planning commission training programs conducted by MAP and MSUE.

**Q:** *In parts of our (rather old) zoning code, there are parts that refer to the “zoning board”. As far as I know, the PC is the zoning board. We also have a zoning board of appeals, and sometimes city staff get mixed up about which body needs to address various concerns, appeals, or questions from residents.,*

**A:** [Mark] This can be confusing, and the zoning board is definitely NOT the zoning board of appeals. Under the MZEA a whole Article (III) is dedicated to the “zoning board” (aka “zoning commission”). Zoning boards in existence as of June 30, 2006 (when the MZEA became effective) were allowed to continue until July 1, 2011. By that time the powers of the zoning commission were required by Sec. 301 (2) of the MZEA to be transferred to the planning commission and thereafter no zoning boards or zoning commissions any longer had any power. In theory, they are now all gone. When zoning first started in the 1920’s before passage of the Municipal Planning Act, there were often no planning commissions and a zoning board or zoning commission was permitted to be quickly formed and to create a plan for the zoning ordinance, and subsequently the zoning ordinance itself. In many rural areas, the community never got around to creating a planning commission and transferring the power of the zoning board to it, despite authority to do so since 1943(??). By providing this sunset provision for zoning boards in the MZEA, and requiring planning commissions to take on their responsibilities for zoning, the MZEA drew zoning closer to planning (and presumably to achieve zoning decisions more consistent with the master plan). Comparable provisions in Sec. 83 of the MPEA closed this gap a little more. MAP has prepared draft amendments to the MZEA that include deleting the provisions of Article III and all other references to the zoning board in the MZEA. It is presently working with other stakeholder organizations to build legislative support for these and related updates to the MZEA.

**Q:** *Can Planning Commissions have substitute Commission members; since Board of Appeals can have substitutes.*

**A:** [Dick] I haven’t looked to see if there is any case law on this, but my guess is (conservative practice would be) not to appoint substitute commission members since they are not explicitly provided for in the MPEA itself. (If the legislature had meant to allow, it would have done so.) [What would the penalty be? Another basis for an unhappy petitioner to shoot at the locality’s planning efforts.]

**Q:** *As a planning consultant who is in a contract with a community on a single project, is it our responsibility to first ensure that the municipality is following all the relevant laws (i.e. has the correct number of PC members, has bylaws, is representative of the community, etc)?*

**A:** [Dick] If a consultant is serving as the local planning official via contract, could arguably have a ~ duty to counsel the legislative body on the basics of the MPEA – including things like PC members, bylaws, etc – although it’s not clear how that would play out. Also, worry a little bit about practicing law... At the very least, if you see something you are concerned about, advise the municipal attorney of your concerns so that she can explore more fully.

[Mark] use a Plan for Planning to do this audit and deliver to PC and attorney.

Andrea to ask and Mark & Dick and Sarah to answer other Questions asked at the webinar [30 minutes]