

Commentary

Providing for Alternate Members on Planning and Zoning Boards: Drafting Effective Local Laws

Patricia E. Salkin

INTRODUCTION

It is not uncommon for members of planning and zoning boards or commissions to have occasional conflicts of interest related to pending applications. In fact, most of the litigation surrounding ethical issues in land use planning and zoning matters involves situations where the applicant or the public believes that a board member had a personal financial or familial conflict that should have been disclosed. A number of cases reported in the media and playing out in the courts have centered on scenarios where a planning or zoning board was unable to conduct business due to a lack of a quorum because two or more board members had conflicts of interest.

A recent news account described how two planning board members were asked by the developer's attorney to recuse themselves from reviewing a proposal for a project that would house two big box stores, because, as private citizens, they had signed a petition to stop the proposed project.¹ This situation led the town board to consider a local law providing for the appointment of alternates—and caused a delay in the project review.² In another situation, a zoning board delayed hearing a matter because three members of the seven-member zoning board informed the city solicitor that they had a potential conflict of interest; the law requires

five participating members to make a decision.³ The mayor of Athens, Alabama, recently announced the need for statutory authorization to appoint two alternate members to the city's planning commission, resulting from "numerous instances" of absent members causing a lack of quorum.⁴

CHECKLIST OF ISSUES TO BE COVERED IN LOCAL LAWS AND ORDINANCES

- Public Purpose and Authority
- Number of Alternates
- Terms of Office
- Duties and Responsibilities
- How Alternates are Selected for Service
- Whether Alternates Count for Quorum
- Voting Rights

In extreme situations, courts have employed a "rule of necessity" to enable conflicted board members to conduct the necessary business of the municipality. For example, in a California locality—where four of five council members had a potential conflict of interest regarding the hiring of a consultant to help with the drafting of a zoning ordinance, and where the city attorney knew that action could not be taken pursuant to a vote of only

one member—the answer was to draw cards.⁵ By drawing cards from a deck shuffled by the city clerk, the two members who drew the highest value cards would be "excused" from their identified conflict of interest since the business before the board had to go on with a quorum eligible to vote.⁶

The California Fair Political Practices Commission approves of this method since it is random, and courts in other states, such as New Jersey, apply the "rule of necessity" to allow, and even require, board members who have conflicts of interest to vote when doing otherwise would result in the municipality's inability to review and decide on an application.⁷ In the New Jersey case, a landowner who owned property contiguous to a private yacht club sought to disqualify seven members of the planning board who were also members of the club. Finding a conflict of interest, the court stated: "It is difficult for the court to believe that a typical citizen would not perceive the clear potential for the objective capacity of the Yacht Club members to be impaired in this setting."⁸ Notwithstanding the recognized conflict, the court concluded that in smaller communities such as this, without an alternate procedure in place to rule on the application, the members of the board should be permitted to rule on the application consistent with their duty to protect the public interest.⁹

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There is, however, a better way. Where possible, municipalities should incorporate the provision for the appointment of alternate members of planning and zoning boards and commissions.¹⁰

STATUTORY AUTHORITY

General

A number of states provide specific state statutory authority for the appointment of alternate members of planning and zoning boards (Alabama,¹¹ Colorado,¹² Illinois,¹³ Louisiana,¹⁴ Maryland,¹⁵ New York,¹⁶ North Carolina,¹⁷ North Dakota,¹⁸ Missouri,¹⁹ Rhode Island,²⁰ Texas,²¹ and Utah²²), yet very few statutes provide any meaningful guidance on how best to implement otherwise broad permissive authority. The failure to specify these details can lead to dramatic controversy, as evidenced recently in a New Hampshire town.

The trouble began when a town official proposed a rule requiring alternates to sit in the audience unless they are actually filling in for an absent or recused regular member. Tempers flared and several heated shouting matches broke out during the meeting, with the alternates accusing the board of having political motives for keeping them in the audience, and the board accusing the alternates of having a “persecution complex.”²³ This scenario raises many questions about the role of alternate board members: whether alternates should have the same duties and responsibilities as regular board members; whether alternate members are considered part of the board or commission regardless if they are actually called to sit in on a particular matter; whether alternate members should have a right or a duty to vote on specific matters where they were not called into action specifically for that matter (e.g., when a duly constituted board votes but there is a tie); and exactly when and how alternate board members are designated for service on a particular matter.

Where specific state statutory authority is not granted, municipal attorneys and planners should look to other statutes to determine whether such authority exists. For example, an Oakland, California, city attorney opined that the planning com-

mission is authorized to appoint alternate members to standing committees of the commission.²⁴ This opinion does not authorize the appointment of alternate members to statutorily constituted land use boards, only to the standing committees thereof. However, the use of alternates should be considered for these committees as well as for other permissive local land use advisory boards established by local governments.

How Alternates Are Designated

It is important to have clear procedures regarding how designated alternates are to be called into service. Without such guidance, the process remains open to criticism because the appointing authority may seemingly pick and choose which alternate is to be selected and at what time in the process. Some states have wisely addressed this in statute. For example, New Jersey statutes require that alternates be designated at the time of initial appointment as “Alternate No.1 and Alternate No. 2” up to four in municipalities with four members.²⁵ In Pennsylvania, the designation of an alternate is to be made on a “. . . case-by-case basis in rotation according to declining seniority among all alternates.”²⁶

Connecticut statutes offer another twist, providing: “If a regular member of a zoning board of appeals is absent, he may designate an alternate from the panel of alternates to act in his place. If he fails to make such designation or if he is disqualified, the chairman of the board shall designate an alternate from such panel, choosing alternates in rotation so that they shall act as nearly equal a number of times as possible.”²⁷ It is peculiar that individual board members should get to select their alternate, particularly when they are disqualified for a conflict of interest from participating in the matter. It would seem more appropriate for either the chair of the board to make the selection or for the local law to provide for the specific rotation so as to avoid even the appearance of impropriety.

Determining the Role of Alternates—Participation and Voting

Most state statutes are silent with respect to specifying the powers and duties

of alternates. Without a local law setting forth clear guidance, municipalities often have to respond unprepared to issues as they arise. A town council in Maryland had to vote on whether alternates could ask questions and submit input when not appointed to replace an absent member.²⁸ The board voted to take a limited approach to involving alternates when they are not officially sitting as a voting member. The town attorney cautioned that the alternate must still be allowed to exercise the right to speak as a citizen. The sole dissenter, however, expressed the opinion that if attendance was mandatory, the alternate ought to be able to do everything except vote.²⁹

Typically, where statutes address the issue, alternates are allowed to vote only when a regular member is absent or disqualified. However, situations may arise where an alternate fills in when a board member is simply absent for some reason; although the proposed project is presented and reviewed at that meeting, the vote might not take place until a future meeting. Whether the alternate should be permitted to vote in this situation is the subject of debate. Michigan law addresses this issue for zoning boards of appeals by stipulating that when an alternate member “fills in” for a regular member, the alternate will preside over that matter until its completion or until a final decision, rather than hand it off to the regular member in the middle of the proceedings.³⁰

New Jersey law, on the other hand, provides that alternates may participate in all board discussions, but they may only vote if a member is absent or disqualified.³¹ Similarly, in New Hampshire, alternates have no authority to participate as board members unless and until they are designated to sit in the place of an absent or disqualified board member; therefore, unless they have been so designated, they are not to participate in board deliberations, ask questions of applicants, or vote on applications or appeals.³²

DRAFTING LOCAL LAWS TO PROVIDE FOR ALTERNATE BOARD MEMBERS

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nate members of planning and zoning boards. The real challenge, however, is the lack of specificity in state enabling statutes to address myriad issues that arise in practice with respect to the appointment and roles of alternate board members. This can be a trap for uninformed attorneys and professional planning staff advising the various boards, and particularly for local legislative bodies that are, in the first instance, the drafters of local laws needed to fill in the gaps.

Starting with the premise that alternate members are needed for the smooth operation of government land use decision making—including the fact that alternates can be used to avoid, whenever possible, tie votes (due to either absence or conflicts), and can be designated to prevent allegations of unethical conduct on the part of board members who may have real or perceived conflicts of interest—state statutes largely leave the task to the creativity of the local government in crafting ordinances and laws governing the procedures for the use of alternate members. With some exceptions, described in the details above, municipalities must develop a fair set of guidelines addressing all aspects of the use of alternates; yet, too often municipalities simply echo minimal state authority and provide no clear rules of procedure or guidance in their local laws.³³ What follows is some advice on what should be considered in the development of local laws, bylaws, and rules of procedure for various local land use boards and commissions.

Naming Alternate Members

Alternate members should be named at the same time and in the same manner as regular board members. This prevents a situation where a local official could be accused of designating an alternate solely due to his stance on a particular current and politically sensitive land use issue. It also allows for a political balance of power when the chief elected official recommends the alternate subject to approval of the local legislative body. It would not be prudent to permit either of these entities, or the planning or zoning board chair, to have the unchecked power to make such an appointment. While some statutes

RESOURCES

APPOINTING ALTERNATE MEMBERS OF PLANNING AND ZONING BOARDS AND COMMISSIONS

Levy County Alternate Planning Commission Member Application: <http://www.levycounty.org/AlternateApplication.pdf>.

New Hampshire Local Government Center, *What is the Role of Alternate Land Use Board Members?* TOWN AND CITY (July/August 2007). Available at: <http://www.nhlgc.org/LGCWebSite/InfoForOfficials/legalqamasterpage.asp?LegalQAID=58%20%20%20%20>.

New York Department of State, Office of General Counsel, Legal Memorandum LU06, *Alternate Members of County and Local Planning Boards and Zoning Boards of Appeals*, at <http://www.dos.state.ny.us/ensl/lu06.htm>.

Patricia Salkin, *Planning for Conflicts of Interest in Land Use Decision Making: The Use of Alternate Members of Planning and Zoning Boards*, 31 REAL ESTATE L. J. 375 (Spring 2003).

Salkin, *Ethics*, Ch. 38, AMERICAN LAW OF ZONING, 5TH ED. (Thomson Reuters 2008).

authorize the appointment of a certain maximum number of alternates (e.g., one or two), where no such limitation exists it makes sense to consider appointing a panel of alternates equal to at least a majority number of the members on the board. In Arlington, Texas, the local law does not provide for alternate members of the planning board, but it does authorize the appointment of four alternate members to the zoning board of adjustment.³⁴

In some cases, local laws are clear that alternate members are considered to be members of the planning or zoning board. For example, the local law in the Town of Silt, Colorado, provides that the planning and zoning commission “shall consist of seven members (five permanent members and two alternates).”³⁵ The Town of Silt’s approach makes it clearer that alternate members are considered part of the board, as opposed to merely an adjunct. This is consistent with the sparse guidance there is in some state statutes that provides that alternate board members shall be held to the same requirements as regular members, such as attendance at meetings and participation in mandated training.

It is also a good idea to find alternate board members who do not specifically resemble other board members. For example, whenever possible, alternates should come from different professions, sit on different volunteer boards, and live in different neighborhoods. This will help avoid situations where both regular and alternate members have conflicts.

Terms of Office

Alternate members should be appointed for specific terms, which may or may not be renewable. Terms can be consistent with the term of office for regular board members (usually three years) and they may be staggered to parallel the terms of office of regular board members. Most statutes are silent as to terms of office for alternates, leaving it purely to local discretion. The Borough of Lake Hopatcong, in New Jersey, provides that alternate members (up to two) shall be appointed for two-year terms, except that their terms may not expire in the same year.³⁶ In Sandy City, Utah, planning commission alternates are appointed for five-year terms, as are regular commission members; the local law further provides that alternate terms shall have a two-and-half year gap between term expirations.³⁷ The Town of Cambria, in New York, allows for the appointment of alternate members of planning and zoning boards for terms of one year.³⁸ While the Town of Silt provides for four-year terms for alternates (the same for permanent members), the local law goes further, specifying that an alternate may become a permanent member of the board upon appointment by the Board of Trustees.³⁹

Duties and Compensation

It is not enough to assume that an alternate will “spring into action” upon a regular board member’s absence or disqualifying conflict. Regular board members attend many meetings and may undergo training, and, after a time

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in office, are fairly familiar with the state and local laws governing land use—more so than the average citizen. Careful consideration must be given as to how to adequately prepare an alternate in the event a regular member is unable to serve on a particular matter. As noted previously, options include imposing the same requirements (and offering the same opportunities) for alternate board members as for regular board members. This includes attendance at all meetings (and a decision as to whether and to what extent, and in what capacity, an alternate member may participate in any of these meetings) and all training sessions.⁴⁰ This may require a small fiscal commitment from the municipality, both for parity of compensation where regular board members receive a “salary” and for additional funds to cover the cost of training.⁴¹ By imposing the same requirements on alternate members, applicants can rest assured that the alternates are as equally prepared to review their application as the regular board members.

Where the additional compensation is not available, or if the municipality determines that equal duties (absent a vote unless officially called into service) are not necessary, alternate members should be appointed as close to the start of a review of the particular application as possible. This means that absences should be announced with as much advance notice as possible⁴² (such as when a board member is leaving for a planned vacation, a scheduled out-of-town business trip, or scheduled surgery), and conflicts of interest for regular board members should be identified and articulated as early as possible.

Designating the Alternate to Serve

In most cases, the legislative body of a municipality will designate more than one alternate. For example, Marshall Township, in Pennsylvania, provides by local law that the legislative body may appoint at least one but no more than three alternate members to the zoning hearing board.⁴³ While this is a permissive local law, that of Town of East Windsor, in Connecticut, provides that the Board of Selectmen shall appoint three alternate members to the planning and

zoning commission.⁴⁴ Local laws and ordinances should set forth the procedure for designating the specific alternate to serve. Wherever possible, discretion should be removed from this designation so as to avoid the appearance that the appointing entity is “shopping” for a particular point of view. Alternates may be designated, for example, as number one and number two, as suggested by state statute in New Jersey. Local procedures should then indicate whether alternates are to be called on a rotating (or alternating) basis. For example, in Lake Hopatcong, New Jersey, where, pursuant to state statute, the alternates are designated as number one and number two, the local law provides that “in the event that a choice must be made as to which alternate is to vote, Alternate No. 1 shall vote.”⁴⁵

There may certainly be instances when both or all alternates serve simultaneously in place of regular board members. In some cases the possibility of political influence has been addressed in state statute or local law; for example, a local law may prohibit all alternate members from being from the same political party.⁴⁶ In Sandy City, Utah, the chair of the board of adjustment is authorized to establish a service rotation system so that no alternate serves more than another.⁴⁷ In the Village of Alfred, New York, the law provides that to the extent practical, the service of alternate shall be rotated.⁴⁸ By local law, the Town of Lebanon, in Connecticut, provides that where a regular member of the planning and zoning commission is absent or disqualified, the commission chair may designate an alternate to act “choosing alternates in rotation so that they shall act as nearly equal a number of times as possible.”⁴⁹

Attendance by Alternates at Meetings and Effect on Quorum

This issue relates in part to the duties of board members as discussed above. Where alternates are required to attend all regularly scheduled board meetings, the applicant is assured that, if a regular member withdraws later in the review process, the alternate member is fully knowledgeable about the issues

involved in the review and proceedings. Issues can also arise when a decision is reached on the application with the assistance of an alternate board member, and the applicant later comes back with a similar or related request. Procedures should discuss what, if any, role the alternate member should have in this situation.

Generally, alternate board members are available when a quorum would not otherwise be possible. However, the Town of Montreat, in North Carolina, makes it clear in its local code that while alternate members may vote in the absence of regular members, the presence of an alternate “shall not be counted when establishing a quorum.”⁵⁰ The opposite guidance is provided in the Town of Grant-Valkaria (Florida), where the ordinance specifically states with respect to the planning and zoning board that: “the first and second alternate shall be counted to establish a quorum as the case may be. For example, if there are only three voting members of the board present, the first alternate shall be counted to establish a quorum and he or she may also cast a vote. If there are only two voting members present both the first and second alternate members shall be counted to establish a quorum and each may cast a vote. . . .”⁵¹

Right to Vote

Typically, alternates will have a right to vote only when they are designated to replace a regular board member for specific reasons. The right to vote is easily understood, for example, when an alternate is appointed to review a particular application because a regular board member has a conflict of interest on that application. More guidance is needed, however, where an alternate is appointed due to the absence of a regular member. In this scenario, does the alternate stay as a voting member of the board, in the shoes of the absent board member, for all future meetings in which matters brought before the board in the regular member’s absence might come up—even after the regular board member has returned to service? This issue can be resolved by simply allowing the alternate to see through,

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from start to finish, all applications that were begun under his service on the board as a full (alternate) member. This option, however, would require the alternate member potentially to “spring into service” at any number of future board meetings. Some municipalities might prefer, particularly where there is no conflict of interest, to have the regular board member assume these responsibilities.

A dilemma exists in situations where the alternates are appointed for reasons other than conflict of interest, such as absences. Legitimate questions arise as to whether alternates should vote on matters that had previously been reviewed by the board prior to the alternate’s appointment, and where the alternate did not attend those meetings. Although an applicant could raise issues of fairness, these are no different from a situation in which a term of office ends for a regular board member and a new board member is appointed to the board. Terms of office do not always end to coincide with the conclusion of all “old business” before the board.

In another twist, the Town of Grant-Valkaria provides by ordinance that, while an alternate may not normally vote as a member of the board, “the first and second alternate shall be entitled to vote on any matter in which the vote of the voting members of the planning and zoning board results in a tie. For example, if there are six voting members present, and a vote results in a 3 to 3 tie, then the first alternate shall cast a vote.”⁵²

CONCLUSION

It is a good idea for municipalities to appoint alternate members for planning and zoning boards. While some states and municipalities specify that such a process may be used only in cases of conflicts of interest, the designation and use of alternates may be a necessity in other scenarios, such as absences due to illness and other personal matters. Given the lack of clarity in most state enabling statutes with respect to the use of alternate board members, local governments should adopt local laws that go well beyond the mere authorization for appoint-

ment. Such local laws and ordinances, and the bylaws and rules of procedure for various boards, must address the range of policy issues that are likely to arise so that the public maintains confidence in the land use review and decision-making process. While this commentary stops short of recommending a model ordinance—because, with respect to some topics, there are differences in state statutory authority—counsels for municipalities should work to draft effective, comprehensive local laws.

ENDNOTES

1. Michael Risnit, *Kent Considering Naming Alternates to Planning Board*, THE JOURNAL NEWS, May 14, 2009. Available at www.lohud.com (search for ID: wst64951631).
2. *Id.*
3. Staff, *Two Zoning Board Members Cite Conflict on Cullion Issue*, PROVIDENCE J. BULL. (Oct. 5, 2006). 2006 WLNR 176268963.
4. Dan Williams, *Some proposals for the state legislature*, THE NEWS COURIER (Jan. 17, 2009). Available at http://www.enewscourier.com/archivesearch/local_story_017221006.html.
5. Sarah Rohrs, *Benicia Council Draws Cards to Determine Voters*, VALLEJO TIMES HERALD (Aug. 3, 2006).
6. *Id.*
7. *Gunther v. Planning Bd. of Borough of Bay Head*, 335 N.J. Super. 452, 762 A.2d 710 (Law Div. 2000).
8. *Id.*
9. *Id.*
10. See *Schweichler v. Vill. of Caledonia*, 45 A.D.3d 1281, 845 N.Y.S.2d 901 (4th Dept. 2007), where the court noted that “the Planning Board’s chairperson is authorized to designate alternate members, if necessary, to replace the three biased members not eligible to participate in the review of the application for site plan approval pursuant to our decision.”
11. See ALA. CODE 1975 § 11-52-13(a) and ALA. CODE 1975 § 11-52-80(a).
12. C.R.S.A. § 31-23-307.
13. 55 ILCS 5/5-12010.
14. See LSA-R.S. 33:4727(A)(2), (3). However, note that in certain parishes and cities, the ability to appoint alternates has been abolished (e.g., Orleans and Slidell).
15. MD CODE, Art. 66B, § 3.02(g); MD CODE, Art. 66B, § 14.04(b)(1); see MD CODE, Art. 66B, § 4.07(b)(1) and (2).
16. GEN. CITY LAW § 81(11); TOWN LAW § 267(11) and VILLAGE LAW § 7-7.12(11) (planning board members).
17. N.C.G.S.A. § 153A-345 (1985); N.C.G.S.A. § 160A-388 (a).
18. N.D.C.C. § 40-47-07.
19. V.A.M.S. 89.080 (1998).
20. R.I. ST. § 45-22-3(c).
21. V.T.C.A., LOCAL GOVERNMENT CODE, § 211.008(c).
22. U.C.A. § 17-27a-301.
23. Ashley Rigizio, *Wakefield PB meeting turns into free-for-all*, CARROLL COUNTY INDEPENDENT (May 20, 2009). Available at http://www.cooscountydemocrat.com/Articles-c-2009-05-20-148568.113119_Wakefield_PB_meeting_turns_into_freeforall.html.
24. <http://www.oaklandnet.com/government/ceda/revision/planningzoning/Commission/3pp.doc>.
25. N.J.S.A. 40:55D-23.1 (1991).

26. 53 P.S. § 10906(b).
27. C.G.S. § 8-5a. But see *Roux v. Lebanon Zoning Bd. of Appeals*, 2003 WL 22133989 (Conn.Super.), where the court noted that while the commission chair should have followed proper procedure in the appointment of the alternate board member, his failure to do so would not invalidate the actions of the board.
28. Town Meeting Minutes for the Town of Emmitsburg, Md. Jan. 5, 2004. Available at <http://www.emmitsburg.net/towngov/tcmm/2004/jan.htm>.
29. *Id.*
30. M.C.L.A. §125.3601(7).
31. N.J.S.A. 40:55D-23.
32. <http://www.nhmunipal.org/LGCWebSite/InfoForOfficials/legalqamasterpage.asp?offset=10&LegalQAID=58>.
33. See e.g., Town of Middletown, R.I., where the charter simply allows the council to designate alternates if they so choose (<http://www.middletownri.com/committees/zoning.php>); and see Franklin, N.H., where the local law simply provides that two alternates shall be appointed, but provides no further procedures (<http://www.franklinnh.org/Planning%20and%20Zoning/Zoning%20Ordinance%20Article%206.pdf>).
34. <http://arlingtontx.gov/citizenboards/index.html#Park>.
35. http://townofsiit.org/html/_data/TITLE02/Chapter_2_16_PLANNING_AND_ZONI.html.
36. <http://www.hopatcong.org/HOP-PL-BD.htm>.
37. <http://sandy.utah.gov/government/community-development/board-of-adjustment/board-members.html>.
38. http://www.townofcambria.com/PDFs/LOCAL_LAW_NO_1_1999-Alternate_Board_Members%5B1%5D.pdf.
39. http://townofsiit.org/html/_data/TITLE02/Chapter_2_16_PLANNING_AND_ZONI.html.
40. For example, in Pennsylvania, alternates to the zoning board “may participate in any proceeding or discussion of the board but shall not be entitled to vote as a member of the board nor be compensated . . . unless designated as an alternate member” pursuant to statute. See 53 P.S. § 10903(b).
41. Where alternates are appointed in Virginia, this is the approach prescribed by state statute. Specifically, the law provides: “The qualifications, terms and compensation of alternate members shall be the same as those of regular members.” See VA. CODE ANN. § 15.2-2308(A).
42. For example, Virginia statutes require that when a regular board member knows that he will be absent from a meeting or will have to abstain from an application at a meeting, he must notify the chairman 24 hours prior to the meeting of such fact. See VA. CODE ANN. § 15.2-2308(A).
43. Marshall Township, Pa., ZONING AND SUBDIVISION CODES, sec. 208-2702. Available at http://twp.marshall.pa.us/Marshall_VIC/default.htm?url=WordDocuments%2F325.htm.
44. See http://www.eastwindsor-ct.gov/Public_Documents/EWindsorCT_Ordinances/68-4.
45. <http://www.hopatcong.org/HOP-PL-BD.htm>
46. See, e.g., http://www.eastwindsor-ct.gov/Public_Documents/EWindsorCT_Ordinances/68-4 (where three alternate members are required to be appointed, no more than two may be from the same political party).
47. <http://sandy.utah.gov/government/community-development/board-of-adjustment/board-members.html>.
48. <http://www.alfredny.org/enforcement.html>.
49. <http://www.lebanontownhall.org/download.htm?r&id=ndbnjil>.
50. <http://www.townofmontreat.org/documents/ZONINGORDINANCEARTICLE11051007.pdf>.
51. <http://www.townofmontreat.org/documents/ZONINGORDINANCEARTICLE11051007.pdf>.
52. <http://www.grantvalkaria.org/ArchivedDocs/Ordinances/2007-04.pdf>.