



Michigan State University Extension
Land Use Series

Elected Officials: Dealing with Constituent Complaints on Planning and Zoning Issues

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Elected officials frequently hear from constituents who are unhappy with a decision concerning a zoning permit, site plan, or the enforcement of a zoning ordinance. This *Land Use Series* pamphlet is written to help elected officials evaluate the options when asked to intervene in such cases. It offers suggestions on how to address specific situations to insure due process and to avoid unintended consequences and additional conflict.

The Role of Legislative Body and Elected Officials

First, it is valuable to review the role of the legislative body. Zoning in Michigan is set up much like our federal or state model of government, with three separate branches, each with its own powers and duties, along with checks and balances. The system is set up so that no one person, or a board or commission, has ultimate power or authority over a zoning decision. The system of checks and balances is done this way, in part, to further protect private property rights as well as to recognize that there can be several different views on any given matter. Those different views need to be worked out through an open process (public meetings or public hearings). It should not be up to any one individual or board/commission to make key zoning decisions.

*“Thirty seven million acres is
all the Michigan we will ever have”*
William G. Milliken

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This work refers to university-based peer reviewed research, when available and conclusive, and based on the parameters of the law as it relates to the topic(s) in Michigan. This document is written for use in Michigan and is based only on Michigan law and statute. One should not assume the concepts and rules for zoning or other regulation by Michigan municipalities and counties apply in other states. In most cases they do not. This is not original research or a study proposing new findings or conclusions.

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Quasi-Judicial

Zoning is characterized with three general divisions of authority: executive/administrative, legislative, and quasi-judicial. The **quasi-judicial** is the community's appeals board. This is the body that hears variance requests, interprets the zoning ordinance (map and text), and hears appeals of administrative decisions. So that no one person has ultimate say, any decision of the zoning administrator can be appealed to the appeals board.

For purposes of this pamphlet the following terms are defined:

Elected officials means members of the legislative body.

Legislative body means a city council, village council, township board of trustees, charter township board of trustees, and county board of commissioners.

Planning commission means a community's planning commission, zoning commission, and zoning board. (On, or before July 1, 2011 the duties of the zoning commission or zoning board shall be transferred to a planning commission. Thus the zoning commission or zoning board will no longer exist (M.C.L. 125.3301(2)).)

Appeals board means the zoning board of appeals.

Zoning administrator includes anyone who is engaged in the day-to-day administration and enforcement (including enforcement officers) of the zoning ordinance. If there is a disagreement over what the zoning ordinance means, it is the appeals board that has the job of resolving the issue.

Legislative

The **legislative** part is the legislative body. The legislative body has the authority to adopt the zoning ordinance, and can adopt changes (amendments) to the zoning ordinance. If a party to the dispute, or the members of the legislative body, dislike an appeals board decision, the legislative body **cannot** overrule the appeals board, but the legislative body can change that part of the zoning ordinance so it accurately reflects the intent of the legislative body.¹ However, this action is an after-the-fact change and typically cannot be applied to an issue prior to the adoption of the zoning amendment or prior to filing an application for a zoning permit.² The legislative body also appoints members of the planning commission and appeals boards, and can influence decisions through appointment of new members. (In cities and villages there is the option for the legislative body to act as the zoning board of appeals if the zoning ordinance specifies that (thus there is not a separate appeals board). However when the legislative body acts as an appeals board they must take off their “legislative body hat”.)

Administrative

The third part is **administrative**. This is the zoning administrator and the planning commission. The zoning administrator is responsible for the day-to-day operation and enforcement of the zoning ordinance. Often this individual is an employee of the government or works for the government on a contractual basis. That means the community should have a detailed job descriptions for all employees or a contract which spells out the scope of services. The planning commission is often responsible for some of the more complex aspects of the zoning ordinance administration, such as special use permits, planned unit developments (PUDs), and detailed site plan reviews, etc. The planning commission also has the job of studying a proposed zoning ordinance or zoning amendment, holding hearing(s), and he legislative body.

If the planning commission does not like an appeals board decision, it, like the legislative body, can initiate a zoning amendment. Also, administrative decisions by the planning commission (site plan review) can be appealed to the appeals board. Planning commission decisions on special use permits and PUD applications can only be appealed to the appeals board if the zoning ordinance specifically says so. If the zoning ordinance does not authorize an appeal of a planning commission decision, then the decision can be appealed directly to circuit court.

¹ The legislative body can also propose a zoning amendment at any time, not just in reaction to an appeals board decision.

² It is not clear when a zoning amendment can be effective – for zoning approvals where the decision has not been made yet, or only for cases where the a complete application was made after the amendment was adopted. There are court cases both ways. Traditionally the rule was when an application was filed the zoning administrator or planning commission had to process it according to the ordinance in effect on the date the application was made. However, over the past decade there have been cases where the community changed the standard, or the zoning district after the application was filed and the court let the decision be made based on the ordinance in effect when making the decision on the zoning approval. A conservative approach (in terms of risk management) is to follow the traditional rule because it is harder to lose a lawsuit under these circumstances. Sometimes a community feels the situation is so egregious, they want to change the rules mid-way through the application process and take their chances to find out if they are legal doing so. Part of the consideration, before changing rules mid-stream, is the community’s possible poor public image within the development community.

Division of Authority for a Zoning Ordinance

LEGISLATIVE

ADMINISTRATIVE

QUASI-JUDICIAL

Planning commission/zoning board reviews request to amend a zoning ordinance

Planning commission/zoning board recommends to the legislative body (township board, village council, city council, county board of commissioners) zoning amendments after holding a hearing with proper notification.

Governing body adopts the zoning ordinance, and adopts the ordinance to amend a zoning ordinance.

Planning commission/zoning board periodically (every 2 to 2½ years) reviews the operation of the zoning ordinance and may propose amendments to the legislative body as needed.

Zoning administrator issues land use permits and certificates of occupancy.

Zoning administrator usually receives Planned Unit Development (PUD), special use permit applications, and site plans (and fees) to check if the applications and site plans are complete. Then the zoning administrator forwards the applications and site plans to the planning commission/zoning board. (In some cases the zoning administrator is authorized to act on site plans and special use permits.)

Zoning administrator patrols the territory of the government to investigate complaints for investigation and initiates steps for enforcement of violations.

Zoning administrator might be assigned additional duties (instead of the planning commission/zoning board members(s)) such as keeping minutes, handling correspondence, preparing and posting notices of special use/PUD, applications and of hearings, calling meetings of the Appeals Board, etc.

Planning commission/zoning board holds hearing on special use permit applications and PUD applications

Planning commission/zoning board acts to decide if a special use permit, or PUD request is granted or not. (A PUD might also be handled as a zoning amendment, depending on how the ordinance is written.)

Planning commission/zoning board oversees the work of the zoning administrator and may recommend to the governing body hiring, firing, job description, etc. of the zoning administrator.

(Quasi-Administrative) The planning commission should periodically update (at

Board of appeals hears and settles appeals of decisions of the zoning administrator (and sometimes administrative decisions by the planning commission/zoning board).

Board of appeals hears and settles appeals on PUD and special land use requests only if specified in the zoning ordinance.

Board of Appeals hears cases to interpret text of the zoning ordinance and boundary locations shown on the zoning ordinance map.

Board of appeals hears cases involving request for:

- Use-Variations (rare or never granted. Townships and counties may not be able to do so.)
- Non-Use Variations also known as dimensional variance (not often granted).

Board of appeals hears issues that might also be assigned to it in the zoning ordinance, such as appeals of PUD request actions, special use permit actions, various nonconforming situations, etc.

Summary of Legislative Role.

In summary the legislative body's roles are:

- Appoint planning commission members.
- Appoint appeals board members.
- Adopt or amend the zoning ordinance (including repealing parts of or all of the zoning ordinance).
- Can (but is not appropriate according to some³) approve special use permits.

What to Do When Asked to Intervene?

Constituents may complain to an elected official, or the whole legislative body, raising objections about:

- The zoning administrator's decision.
- The appeals board's decision.
- The planning commission's decision on a site plan review.
- The planning commission's decision on a special use permit, or planned unit development (that does not require a zoning amendment).
- The attitude or behavior of an individual (such as the zoning administrator).
- Some part of the zoning ordinance (map or text).

Due Process

If an elected official, or for that matter, anyone gets a complaint about the above issues, trying to intervene, or interject one's self into the process can often do more damage than good. Further, such interjection, more often than not, results in someone losing their due process rights. The right to due process is a constitutional right.

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

³ Legislative body special use permit (and planned unit development handled as a special use permit) approval, while allowed under Michigan statute, can be viewed as poor policy because: (1) Doing so mixes an administrative function with a legislative body. (2) Often legislative bodies are not set up to create findings of fact and other detail that is required in the process of making an administrative decision. Thus more often than not, the record of the decision is weak or inadequate when done by a legislative body. (3) Some suggest there is an inherent conflict of interest, where a legislative body has the job of following popular sentiment, when the decision should be based on factors such as the findings of fact, property rights considerations, and so on. (4) In balancing public interests against an individual property owner's interests, there are often times when legal considerations indicate private property interests should prevail but this becomes problematic when elected officials must uphold a principle of law, yet vote the opposite of strong public sentiment. (5) Some elected bodies desire potentially unpopular decisions to be made by another board, so the other board "takes the heat" instead of the elected officials.

As a counterpoint some municipal attorneys advocate the legislative body should approve special use permits and PUDs because: (1) Discretionary decisions should be made by the legislative body because it is elected (not appointed) and is more accountable to citizens than a planning commission. (2) The legislative body should make the final decision, after receiving a recommendation from the planning commission because discretionary decisions allow for judgement, and elected officials are better able to balance public interests. (3) Only in regard to PUDs the legislative body should make the decision with the PUD handled as a zoning amendment (rather than as a special use permit) because of the deference which courts give to legislative actions.

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁴

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.⁵

Procedural due process refers to decisions related to administering, amending, or appealing issues concerning the zoning ordinance. These steps, or procedures are not unnecessary details, they are designed to provide the due process of law that our federal and state constitutions require. The reason for due process is so that various sides can get hearing notices, know about a proposal, appear at the hearing and be heard: the opposition can hear what is said and has the ability to respond. When an elected official intervenes in a manner that is inconsistent with state law or the zoning ordinance, that action is changing the established procedure. While this may seem like a technicality, and the intervening actions may/could result in a decision made quicker, this intervention could be viewed by a court of law as a denial of due process and expose the local unit of government to serious litigation.

This kind of expensive recourse by an aggrieved party can also happen if the legislative body intervenes in the process by doing things like ordering the zoning administrator to issue, or deny a permit, revoking a permit already granted, or trying to over-ride an appeals board decision.

When an elected official intervenes in a manner that is inconsistent with state law or the zoning ordinance . . . this intervention could be viewed by a court of law as a denial of due process and expose the local unit of government to serious litigation.

Unintended Consequence

Often the reason given for an elected official wanting to intervene is to avoid a law suit. Another reason given is because the elected official desires a certain decision to be made (help the constituent, bring business to the area, stop harm to a neighborhood, etc.). In both cases intervention often increases the likelihood of the local government being sued – not decreases it.

An aggrieved person has the right to file a law suit on a zoning matter after exhausting all other local remedies. That means they have tried to get a zoning permit from the administrator, tried to get a special use permit, tried to appeal the issue with the appeals board, and tried to amend the zoning ordinance, before they can go to court. This all takes time, and one can see an applicant going through each of these requests which can be a forewarning legal action may be coming. When one does take an issue to a Michigan circuit court, the action to appeal is subject to a deadline.⁶ The exception to the “exhaust all

⁴ 14th Amendment, United States Constitution

⁵ Article-I § 17, Michigan Constitution of 1963

⁶ A circuit court appeal from a decision of a zoning board of appeals “shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision.” M.C.L. 125.3606(3). A circuit court appeal from a planning commission decision (that cannot be taken to the appeals board) must be filed within 21 days according to

local remedies first before going to court” rule is if the issue is a constitutional challenge. Appeals of these types can be filed at any time (in state or federal courts). If the issue involves intervention by an elected official, which brings into question issues of due process (procedure change), that is a constitutional challenge which allows one to go to court right away. Other constitutional challenges would include things like substantive due process, takings, discrimination, free speech, practice of religion, and so on.

Suggested Action to Consider

The best action to take, when someone makes contact to complain, is to explain the concepts outlined above in this Land Use Series pamphlet and encourage the individual to follow the procedures and processes. One can also make copies of this pamphlet to handout. For example, if the individual is upset with a decision of the zoning administrator, that person should be counseled to take their case to the appeals board. That is why the appeals board exists. If the individual is upset with a decision of the appeals board, they should be counseled to propose a zoning amendment to resolve the issue. No matter how carefully a zoning ordinance is written, there is always room for improvement, and that is one of the reasons why the zoning amendment process is available.

If the elected official serves in a strong manager form of government (such as many cities) referring the complaint to the chief administrative officer (e.g., a City Manager) to follow through with is also a wise course of action. Then the chief administrative officer would proceed to encourage the individual to follow procedure (appeals, seeking an amendment, etc.).

One of the most important first steps is to always check the zoning ordinance to know those procedures before doing anything else. Then follow those procedures.

Many zoning ordinances have specific procedures for the zoning administrator, planning commission, and appeals board to follow. Also some zoning ordinances have specific procedures to follow if a mistake is made. One of the most important first steps is to always check the zoning ordinance to know those procedures before doing anything else. Then follow those procedures. The summary of this pamphlet contains other resources that may be useful.

How Does A Legislative Body Influence Zoning Decisions?

This pamphlet started with a review of the various roles of the administrative, quasi-judicial and legislative bodies. Following is a brief outline in more detail of the authority legislative bodies have. Each of the items below are an appropriate course of action for an elected official to consider. Nearly all require the whole legislative body to act on the issue, **not** an individual elected official acting alone.⁷ Also note, the course of actions outlined below do not address the

*Nearly all of the appropriate course of actions for an elected official require the whole legislative body to act on the issue, **not** an individual elected official.*

court rules that provide in part (except as prescribed by another statute or court rule), an appeal of right must be taken within “21 days after the entry of the order or judgment appealed from.” MCR 7.101(B)(1).

⁷ Unless empowered by the legislative body as a committee of one, or some other similar action an elected official is part of a legislative body which acts as a group, not as individuals.

immediate issue. Rather they address a larger picture, to direct policy changes for the future.

Zoning Administrator Decision

When an individual objects to a decision made by the zoning administrator, then:

- Let the individual know they can appeal the zoning administrator's decision if they are an "aggrieved"⁸ person. Action to appeal should not be delayed, as there is often a deadline⁹ for an appeal to be filed.¹⁰
- Anyone can appeal a decision to the appeals board, including the legislative body or any officer or department of the local government. The statute says "An appeal to the zoning board of appeals may be taken . . . by an officer, department, board, or bureau of the state or local unit of government" (M.C.L. 125.3604(1)). Action to appeal should not be delayed, as there is often a deadline for an appeal to be filed.

Appeals Board Decision

When an individual objects to a decision made by the appeals board, then:

- The legislative body can act to initiate an amendment of the zoning ordinance, so the zoning is changed to require something different.
- The legislative body can appoint different members to the Appeals Board when their term of office ends (three year-staggered terms).

Planning Commission Site Plan Review

When an individual objects to a decision made by the planning commission on a site plan review, then:

- Let the individual know they can appeal the site plan review decision if they are an "aggrieved" person. Action to appeal should not be delayed, as there is often a deadline for an appeal to be filed.
- Anyone can appeal a decision to the appeals board, including the legislative body or any officer or department of the local government. The statute says "An appeal to the zoning board of appeals may be taken . . . by an officer, department, board, or bureau of the state or local unit of government" (M.C.L. 125.3604(1)). Action to appeal should not be delayed, as there is often a deadline¹¹ for an appeal to be filed.

⁸ "Aggrieved Party" means one whose legal right has been invaded by the act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. The interest involved is a substantial grievance, through the denial of some personal, pecuniary or property right or the imposition upon a party of a burden or obligation.

It is one whose rights or interests are injuriously affected by a judgment. The party's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.

Only aggrieved parties can appeal a particular order or judgement.

Derived from *Lectric Law Library* (<http://www.lectlaw.com/>). See also: *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898-899 and *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1132

⁹ Usually that deadline is found in the appeals board's rules of procedure (by-laws) or in the zoning ordinance.

¹⁰ If a person has relied upon a properly issued permit to build something that someone is objecting to, they may have to go straight to circuit court and seek an injunction to halt construction while the matter is sorted out. An injunction, or halting construction is not something the legislative body is empowered to do. That has to be a court action.

¹¹ Usually that deadline is found in the appeals board's rules of procedure (by-laws) or in the zoning ordinance.

- The legislative body can act to initiate an amendment of the zoning ordinance, so the zoning is changed to require something different.
- The legislative body can appoint different members to the Planning Commission when their term of office ends (three year-staggered terms).

Planning Commission Special Use Permit Decision

When an individual objects to a decision made by the planning commission on a special use permit, or planned unit development (that does not require a zoning amendment), then:

- The legislative body can act to initiate an amendment of the zoning ordinance, so the zoning is changed to require something different for future cases.
- The legislative body can appoint different members to the Planning Commission when their term of office ends (three year-staggered terms).
- Only if the zoning ordinance specifically provides for such appeals:
 - Anyone can appeal a decision to the appeals board, including the legislative body or any officer or department of the local government. The statute says “An appeal to the zoning board of appeals may be taken . . . by an officer, department, board, or bureau of the state or local unit of government” (M.C.L. 125.3604(1)). Action to appeal should not be delayed, as there is often a deadline for an appeal to be filed.
 - Let the individual know they can appeal the site plan review decision if they are an “aggrieved” person. Action to appeal should not be delayed, as there is often a deadline for an appeal to be filed.

Individual Attitude or Behavior

When an individual objects about the attitude or behavior of an individual (such as the zoning administrator), then:

- In the case of a zoning administrator: this should be handled as an employer-employee issue. It should be referred to the employee’s immediate supervisor, or the chief administrative officer. Take care to make sure the context is not directing the employee to issue zoning permits which should not be issued, to deny permits which meet all ordinance requirements, revoke permits which have been properly issued, or revoke permits where vested interest has been established (construction already started), absent a court order. Do not put the local government in jeopardy by “instructing” an employee to do illegal acts/not follow the zoning ordinance, due process, or other requirements. (If the zoning administrator works on a contract basis, the government’s supervisory authority over the individual is much less.) In either case working with a knowledgeable attorney for these types of issues is recommended.
- In the case of a member of the zoning board of appeals: Members “may be removed by the legislative body for misfeasance, malfeasance, or nonfeasance in office upon written charges and after public hearing.”¹²
- In the case of a member of a planning commission:

¹² M.C.L. 125.3601(8)

The legislative body may remove a member of the planning commission for misfeasance, malfeasance, or nonfeasance in office upon written charges and after a public hearing.¹³

- In the case of a member of a joint planning commission: By using “conditions and procedures for removal from office of members of the joint planning commission and for filling vacancies in the joint planning commission” as spelled out in the municipalities’ agreement, adopted by ordinance, establishing a joint planning commission. (M.C.L. 125.315(c))
- In the case of a member of a zoning commission/zoning board:¹⁴ “The legislative body shall provide for the removal of a member of the zoning commission for misfeasance, malfeasance or nonfeasance in office upon written charges and after public hearing.” (M.C.L. 125.3301(9))

Disagreement with a Provision of the Zoning Ordinance

When an individual objects to some part of the zoning ordinance (map or text), then:

- The legislative body can act to initiate an amendment of the zoning ordinance, so the zoning is changed to require something different.
- The legislative body can act to initiate the repeal of a part of the zoning ordinance or the entire zoning ordinance.

In both these cases, the amendment, or repeal of a specific provision or the whole zoning ordinance, has to be referred to the planning commission, which studies, prepares or writes the text of the amendment/repealer, conducts a hearing(s) on the proposal, and then presents its recommendations back to the legislative body. There are more steps and detail to this procedure, which can be found in the *Land Use Series* “Check List #4 For Adoption of a Zoning Ordinance Amendment (including some PUDs) in Michigan” and found at <http://lu.msue.msu.edu>.

In the cases of an appeals board decision or a planning commission decision which cannot be appealed to the appeals board, the legislative body also has the option to take the issue to circuit court. This should be a last resort, or not even seriously considered because of all the other previously listed actions the legislative body can take. Also going to court means one part of the local government is suing another part of the same government. This would be expensive (paying legal costs for both sides) and has a negative public relations effect.

¹³ M.C.L. 125.3815(9). This quotes the Michigan Planning Enabling Act which took effect September 1, 2008. Prior to that date three different statutes (now repealed) applied:

In the case of a member of the municipal planning commission: “A member may, after a public hearing, be removed by the mayor for inefficiency, neglect of duty, or malfeasance in office.” (M.C.L. 125.33(1))

In the case of a member of the county planning commission: “may remove a member for nonperformance of duty or misconduct upon public hearing.” (M.C.L. 125.102(5))

In the case of a member of a township planning commission: “Members may be removed by the township supervisor, after a hearing, with the approval of the township board.” (M.C.L. 125.324(2))

¹⁴ On, or before July 1, 2011 the duties of the zoning commission or zoning board shall be transferred to a planning commission. Thus the zoning commission or zoning board will no longer exist (M.C.L. 125.3301(2)).

What to Do When an Elected Official Intervenes

There will be times when an elected official inappropriately attempts to intervene in a zoning decision. For examples any of the following can be problematic:

- The mayor directs the zoning administrator to issue a permit.
- The township supervisor directs the zoning administrator to deny a permit.
- The county board directs the zoning administrator to revoke a permit.
- The village council disagrees with the decision of the planning commission or appeals board and acts to overrule it.
- The township board agrees with the decision of the planning commission, zoning administrator, or appeals board – but the decision is contrary to the zoning ordinance.
- The county board tells the zoning administrator to ignore a particular zoning ordinance provision when processing as request.

Any of these types of actions may cause concern by another elected official, by a member of the planning commission, zoning board, or by zoning staff such as the zoning administrator. In this situations the first course of action, when such actions are proposed is for the two individuals to talk to each other. This may be a discussion between the elected official proposing the action or the chief elected official and the zoning administrator or spokesman for the planning commission or appeals board. The purpose of the talk is to explain the problem(s) with the proposed action. Use the material in this pamphlet if that may help. The discussion should be private, so that people can discuss the issues important to them and find a resolution that may save face or avoid actual action being taken in the first place.

If the first discussion does not work, then the zoning administrator or spokesman for the planning commission or appeals board may need to seek assistance from others on the legislative body or from the city manager or administrative/management staff. Sometimes this step may also involve seeking help from an outside expert (consulting planner, the municipality's attorney, etc). The talk is with two or three sitting down with the elected official proposing the action. In this case the discussion may be more effective between peers (one elected official to another elected official). In other cases it helps to have the discussion with someone who has an authoritative position. The goal, again, is to discuss the issue important to them and find a resolution that may save face or avoid actual action being taken in the first place.

If still not successful, the third option is to bring the issue up at the legislative body's meeting (or first at a committee, or through a formal procedure (such as an employee grievance procedure) set up for this purpose). In this step the matter becomes public, and the property owners affected will become aware of the issue (if they are not already) and can explore and choose their options to protect their interests.

First try to talk one-on-one in private. If not successful ask a third to join in a discussion. Finally, bring the issue up at a meeting.

Summary

Michigan State University Extension Land Use Team has a number of programs and *Land Use Series* pamphlets which can help citizens be more effective in expressing their views and representing their case on zoning matters. These materials are available at a web site (<http://lu.msue.msu.edu>). MSU Extension

also has training programs which can be offered to citizen groups, neighborhoods associations, or others. These can be set up by contacting your MSU Extension. Elected officials may find it useful to provide these materials and to help set up these training sessions for constituents.

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