

A Just Code of Ethics for Planners

A Priority for Planners Network

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Editor's Note

In 2013 the Planners Network Steering Committee decided to focus on the serious lack of enforcement of planning ethics, particularly when it comes to issues of social justice. The editors of *Progressive Planning* invited Peter Marcuse and Harley Etienne to start a discussion and debate about planning ethics. Their contributions follow. We invite responses from readers and other contributions so that we may keep the issue alive and help inform future action by Planners Network.

PLANNERS NETWORK is in a unique position to press for a much needed change in the A.I.C.P. Code of Ethics. The current code fails to clearly formulate a critical social justice principle. It makes a spurious distinction between principles that planners should aspire to and those they should be held accountable to by the code of conduct. This makes it extremely difficult to hold anyone accountable to fundamental principles of social justice.

The Context: Currents in Urban Planning

There have always been conflicting currents in the theory and practice of planning:

- A *technocratic* current, deferential to the existing structures of power. This sees planning simply as a tool to achieve goals that are given it, in as efficient manner as possible;
- A *liberal reformist* current, moving generally within existing

relationships of power, using planners' influence to move plans towards their more liberal and justice-respecting ends;

- A *transformative* critical current, more radical and closer to utopian, holding that planning, as an activity dedicated to the application of reason to physical and social relations necessarily implies a set of its own values, that might well lead it into a critical stance favoring social justice.
- A *utopian* approach, not practical in the present but with radical implications for an alternative vision it creates.

Planners Network was founded in opposition to the technocratic current. It has recognized that, following a deferential technocratic (if not reactionary) logic, too many planners have been instrumental in the creation, solidification, and perpetuation of segregation and exclusion in U.S. cities and suburbs, with the attendant oppression of minority groups, prominently African Americans. Technocratic planners have put forward zoning plans and principles that ignore their racial impacts; incorporated racist considerations



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in the housing policies they have drafted, developed transportation plans, environmental regulations, subsidy schemes, criminal justice rules and health and educational plans that, by act and omission, have sustained and exacerbated inequality and injustice. Their actions have supported what Israeli scholar Oren Yiftachel has called the “dark side of planning.”

Planners Network has worked within the liberal reformist current of planning in opposition to this technocratic direction. Many of its individual members would undoubtedly see themselves as promoting the more radical transformative current, including a deeper critical stance to the prevailing order, but understand that radical change is not on the immediate agenda and must be pursued by more reformist policies that are practically winnable and have longer-term transformative potential. Thus, they take a critical approach.

Handling the racial implications of zoning plans affords a classic view of the distinction between the different currents in planning. In times past some planners consciously prepared and supported explicitly racist plans. Today, presumably, few would. Yet the mainstream of the profession today, situated towards the liberal end of the technocratic approach, has not taken a firm position on whether, for instance, planners have an affirmative obligation to present and argue for an inclusionary zoning pattern, even against a client’s wishes. Planners Network, I would argue, could take that position, holding that planners must be charged with the responsibility to address directly the racial impacts of what they do. The organization should strongly encourage a movement in a more progressive direction, consistent with the best of its the history in grappling with issues of social justice and racial discrimination.

The profession’s Code of Ethics is, or ought to be, a clear site for the formulation of planning policy on racial and ethnic justice. But the recent revision of AICP Code studiously avoided this. And it is a battle that Planners Network ought to take up aggressively. This would not only clarify where planning stands on issues of racial justice, but also have an immediate and salutary impact on some very practical and important issues.

Few would question that planners should know whether the results of proposed zoning, land use, and housing

actions and inactions will be discriminatory. It logically follows that what planners do with that knowledge should as well be spelled out in the professional Code of Ethics. However, that is not now the case. Making that happen should be a high priority for Planners Network.

The History and Potential of the Code of Ethics

Members of the American Planning Association (APA) and American Institute of Certified Planners (AICP) are required to be guided by the APA/AICP’s Code of Ethics and Professional Conduct, and have the responsibility to “seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration.” (<http://www.planning.org/ethics/conduct1991>) They are required to know whether the results of zoning, land use and housing actions and inactions will be discriminatory.

The original Code of the AICP, from the time of its formal constitution in 1978, contained the following provision, under the heading: “The Planner’s Responsibility to the Public:”

A planner’s primary obligation is to serve the public interest. While the definition of the public interest is formulated through continuous debate, a planner owes allegiance to a conscientiously attained concept of the public interest, which requires these special obligations:

Under that heading, for instance, these include the following responsibility:

A planner must strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons, and must urge the alteration of policies, institutions and decisions which oppose such needs.

Wanted: A clear formulation of a critical social justice principle

That provision was in the Code for a long time, as the first of a long list of ethical precepts (along

with provisions about disclosure, appropriate forms of competition, professional relationships, honesty, confidentiality and loyalty in relations with a client, and conflicts of interest). But it was not enforced or spelled out in detail. At the height of the Civil Rights movement in the 1960s, *The Planner's Responsibility to the Public: a Statement on the Social Responsibility of Planners* was proposed for adoption by the American Institute of Planners (the predecessor to APA) but not incorporated into its Code. Thus there was no differentiation between the general requirement for a critical social justice approach to planning and the requirements for professional conduct along deferential technical lines. Both were left very vague.

In addition to being vague, the Code had no adequate enforcement mechanisms. That problem led the AICP to undertake a thorough-going revision of the Code. As it stands since October 3, 2009, it follows what the lawyer charged with the drafting proposed, that the new code should separate out the “public interest” provisions to make them an “aspiration” and not binding, while the other “rules of conduct” should be binding on members.

The distinction between aspirations and rules of conduct

The revised code was adopted and made the distinction between aspirational principals and rules of conduct, as follows:

Section A contains a statement of aspirational principles that constitute the ideals to which we are committed. We shall strive to act in accordance with our stated principles. However, an allegation that we failed to achieve our aspirational principles cannot be the subject of a misconduct charge or be a cause for disciplinary action.

Section B contains rules of conduct to which we are held accountable. If we violate any of these rules, we can be the object of a charge of misconduct and shall have the responsibility of responding to and cooperating with the investigation and enforcement procedures. If we are found to be blameworthy by the AICP Ethics Committee, we shall be subject to the imposition of sanctions that may include loss of our certification.

The following was consigned to an “aspiration” under Section A, not as a Rule of Conduct:

f) We shall seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration. We shall urge the alteration of policies, institutions, and decisions that oppose such needs.

Arguably this relegates the concern of social justice planning to a less important concern of the profession, something hoped for but not considered essential. In such a reading, good deferential technical planning is required of all planners, but commitment to social justice values are only aspirations, not requirements.

Admittedly, the precise definition of “social justice values,” and “the public interest,” as used in the 1978 Code, is a difficult one, and in need of much discussion. There would probably be a large consensus around a ban on actions that have adverse racially discriminatory results; whether a similar ban on gender discrimination would meet with wide approval is perhaps another question. Or should we push for color conscious and/or affirmative action to be parts of the definition of social justice? Such a debate would have been an extremely healthy undertaking for the profession.

Unfortunately that opportunity was lost. Instead, all social justice values were simply assigned the vague “aspirational” label, and that was that.

The big argument against enforcing a requirement that a planner should promote social justice might be that you can't tell whether a planner might have wanted to do so and intended to do so, but was prevented from doing so by the realities of the situation in which the planner was working. A planner should not be penalized if, despite good intentions, he or she was not able to do more to implement them. And how are we to judge a planner's “intent”?

But is it “intent” in the psychological sense that's involved here? Or is it rather the same kind of “intent” that's involved in most tort and many criminal cases in ordinary law. This holds that, absent countervailing

evidence, a person is presumed to have intended the reasonably foreseeable results of his or her actions.

How would such an approach work in a planning Code of Ethics?

In several recent cases involving charges of racial discrimination, one of which is still pending as this is written, the application of strict and enforceable ethical standards might be hypothetically thought through.

Under the Fair Housing Act, local government actions having a disparate impact on race have been held a violation of the Act, whether or not that impact was intended. That rule on the sufficiency of a disparate impact has been challenged with the argument that a finding of “intent” to discriminate was necessary before a violation could be found. But how can that intent be demonstrated in a court of law? It is, after all, the intent of an official body, often in fair housing cases a planning commission, and its members are hardly likely to state on the record a desire to discriminate against a minority group. At most, euphemisms might be used, such as the desire to “preserve the character of the neighborhood.” In a recent case in which I filed an Expert Report at the request of the plaintiff, the euphemisms argument was in fact made: *MHANY Mgmt Inc. v. Incorporated Village of Garden City*, 2013 WL 6334107 (E.D.N.Y. 2013). The court however found other sufficient evidence of intent from the public hearings and history to sustain a finding of violation of the Act.

Suppose a professional planner had been consulted by the relevant commission, as would typically be the case. Suppose the planner’s analysis showed a given zoning proposal would in fact have a disparate impact, for instance by excluding multi-family or small lot inexpensive single family housing, where there was significant demand by members of minority groups for such housing in that community? Suppose the planner, although realizing that fact, decided there was no point in raising it to the commission because they were obviously not going to follow a recommendation for inclusionary, non-discriminatory housing since the neighborhood was 97% white. The planner might suggest multi-family housing as one among other options, without mentioning racial impact,

but might well not go further despite his or her own pro-integration values, to not risk alienating his or her client. This is certainly not an unusual scenario.

But suppose the Code of Ethics had a clear and enforceable mandate requiring a planner to

... promote racial and economic integration [and] to plan for the needs of the disadvantaged [and] to urge the alteration of policies, institutions, and decisions that oppose such needs.

Now the planner can and should come before the commission and say: “honored commission members, it is my painful duty to tell you that this zoning plan you are considering will have a specific and negative disparate impact on minority group members who live in your community or might want to live there, and my studies suggest there is considerable demand by them. But if you limit permissible uses as this proposed plan does, you will have a disparate and negative impact on such members. I regret having to tell you this, because I know that some of you, and certainly some of your neighbors, would like to see this plan in effect even if it should have such a disparate impact. But unfortunately I have to say this to you, and to urge you to change the plan. Because if I did not so inform and urge you, I would lose my professional status as a planner and member of the American Institute of Certified Planners, and you would be hard pressed to find a certified planner to take my place. I urge you to withdraw the plan, but of course the decision as to whether you adopt it or not is up to you.”

Now, if the commission decides to go forward with the plan, it can certainly be dealt with as having intended the known consequences of its action. The planner cannot get into trouble with his or her profession because of working on a plan having a disparate impact, because there is clear countervailing evidence that that impact was not intended on his or her part. The purposes of the Fair Housing Act will have been well served, in accordance with the values and aspirations of the planning profession.

Planners Network should urge the AICP and the APA to change their ethical codes accordingly. **P²**