INSTITUTE FOR LOCAL GOVERNMENT

An Ounce of Prevention:

BEST PRACTICES FOR MAKING INFORMED LAND USE DECISIONS

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Primary Contributors
Bill Higgins, Institute Staff

Additional Contributions
JoAnne Speers and Charles Summerell, Institute Staff

Additional Review Provided by
Gary Binger, Land Use Consultant
Rochelle Browne, Richards, Watson & Gershon
George R. Buell, City of San Clemente
Will Caplinger, City of Crescent City
Ann R. Danforth, Town of Tiburon
Barry K. Hogan, City of Moorpark
Michael Jenkins, Jenkins & Hogan, LLP
Vivian Kahn, Dyett & Bhatia
Nancy Kaytis-Slocum, City of Ferndale
Kenneth D. Rozell, Wallin, Kress, Reisman & Kranitz
Gary Y. Sugano, City of Lomita
Peggy Temple, City of Corona
Patrick Whitnell, League of California Cities

All decisions regarding the final content of this guide were made by the Institute for Local Government. Remember to always consult a knowledgeable attorney when confronted by legal issues.

Introduction

"After all, a policeman must know the Constitution, then why not a planner?"

This question posed by U.S. Supreme Court Justice William Brennan[1] serves as a good starting point for this publication: If frontline police officers must know and enforce the nuances of constitutional law in the heat of law enforcement activities, why not ask the same of those making land use decisions?

Land use decision-making is admittedly volatile: developers want entitlements, environmentalists want growth management, and neighborhood organizations want a say in the approval process. Plus, any number of historic preservation groups, cultural groups, unions, taxpayer organizations, and affordable housing advocates may take issue with any given decision.

[1] *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 661, n.26 (1981) (Brennan, J., dissenting).

Controversial land use decision-making can therefore become a "Catch –22" for local agencies, where the applicant will sue if the project is denied and opposition groups will sue if the project is approved.

This publication started out as a guide to minimizing the risk of litigation. But the research revealed that often the best way to avoid litigation is to implement good decision-making processes. Just as "walking the beat" prevents more crime than a perfectly executed search warrant, designing inclusive hearing procedures is a better risk management tool than merely assuring the public three minutes of testimony.

Procedural Due Process

Local officials have three roles in land use matters.[2] First, in their legislative role, they plan for development by adopting the general plan or implementing zoning ordinances. Second, in their quasi-judicial capacity, they review project proposals for consistency with plans and ordinances. Finally, in their enforcement role, they implement their vision for development by assuring that approved projects comply with the applicable laws and conditions imposed.

Property owners and applicants are entitled to procedural due process when an agency acts on a general plan amendment, specific plan, zoning ordinance, or subdivision approval. As discussed in Chapter 2, the standards are slightly different depending on whether the agency is acting in its legislative or quasi-judicial capacity. But the essence is the same: affected parties must receive adequate notice of all hearings (that is written in a way that can be reasonably understood) and have a fair opportunity to air concerns or rebut evidence presented.

In California, the procedural requirements go farther. Several statutes require greater notice and public involvement. For example, the Brown Act, the notice and publishing requirements in the Planning and Zoning Law, and the review and comment process in the California Environmental Quality Act (or even the National Environmental Policy Act) all assure specific notice and participation rights.

General Preventative Risk Management Strategies

- **Regularly Review Land Use Controls.** Agency staff should regularly review zoning and subdivision ordinances to assure they are up-to-date. Areas to watch include environmental, sign, adult entertainment, telecommunications, and affordable housing requirements. Also, the agency should assure that the language in current regulations is consistent with past staff and council interpretations of policy.
- **Provide Strong Staff Support.** Provide support for all decision-makers, including elected officials, planning commissioners, design review board members, and even zoning administrators. Full staff support helps the process move more quickly and predictably. It also assures that all relevant information will be analyzed in the staff report and that adequate findings will be drafted in support of the decision.
- **Develop Written Hearing Procedures.** A written set of procedures to follow at each public hearing will help reduce contentiousness. Both the applicant and the public will know what to expect. Ideally, the procedures should include a description of the process, the time limits in which the hearing will be held, how testimony will be heard, and overall meeting decorum.
- **Act As An Unbiased Fact Finder.** Many land use matters involve a hearing where the decision-maker evaluates standards and applies them to a given set of facts. Here, the decision-maker is playing a role similar to that of a judge and must retain a degree of neutrality. Decision-makers should refrain from talking with applicants (except at meetings) and avoid the appearance of favoritism.
- **Get Training.** Everyone involved in land use decision-making—from the new planning commissioner to the most seasoned staff—should have constant training opportunities to better understand each other's role, stay abreast of recent developments, and develop new ideas.

[2] Daniel J. Curtin, Jr., *Legal Issues Association with Land Use Decision-making*, paper presented at 2004 Planners Institute, League of California Cities.

The silver lining is that local agencies still enjoy a degree of deference from the courts—particularly when they are acting legislatively. However, courts increasingly require decisions to be supported by sound data and reasoning. Local agencies that understand these rules reduce their exposure to the costs of litigation and liability.

A Starting Point for Fairness and Predictability

Fair decision-making processes promote better governance and reduce the risk of litigation. In this respect, constitutional and statutory procedures and criteria are a baseline. In this context, it is helpful to think of the overarching goals of what decision-making processes are trying to achieve:

- **Well-Defined General Plan.** The general plan is the cornerstone for a community's physical development. It assures that there will be sufficient housing, jobs, open space, and infrastructure. But it is also the foundation for setting expectations about how land can be developed. As such, a well-defined vision in the general plan also serves as the baseline for a land use risk management strategy.
- **Inclusive and Informed Decision-Making.** If a decision is only as good as the evidence supporting it, the information-gathering process is important to well-reasoned decisions. Decisions vetted by civic engagement are more likely to address trouble points and limit the risk associated with any unintended consequences. Such information can also identify solutions that will make the project more feasible. The information may also be used to craft findings that better support the final decision.
- **Predictability.** Interested parties should be able to reasonably predict what types of projects will be approved or denied. Failure to define or prioritize criteria results in inconsistent decisions that are more likely to be interpreted as arbitrary by courts. Given the emotional and financial stakes often associated with land use decisions, it's understandable that people may act out of fear or anger when the process is perceived as unfair.
- **Balance Benefits and Burdens.** Predictability does not mean that the same decision must be made for each application. Each parcel is unique. Land use regulation is built on the premise that the sum of an agency's plans, ordinances, and policies will balance the benefits and burdens of regulation. This assures that different areas are set aside for housing, commercial activities, schools, and open space.
- **Specificity, in Plain English.** Policies, final decisions, and even comments from decision-makers should be easy to understand. Avoid acronyms and definitions that can confuse those who do not work in the field professionally.

The decision-making process should always be objective and consistent. People do not generally fare well with uncertainty. With good planning, much of the contentiousness surrounding the land use decision-making process can be resolved.

The Goal of this Publication: Managing Risk

One of the most frustrating aspects of land use planning is to see a wise policy decision set aside because of a technicality. Given the latitude that agencies have to act substantively, procedural challenges often pose a greater risk of litigation and liability to local agencies. Not only is it likely that the agency will incur additional expenses in the form of substantial attorneys' fees, but the value of the time and money devoted to the project may be lost permanently.[3] Moreover, litigation undermines the public's confidence in the governmental process, which in itself can lead to more misunderstandings and further litigation.

This publication does not provide the "silver bullet" for avoiding land use disputes. Nor does it address compliance with specific land use laws. Instead, it focuses on the underlying procedures

[3] *Id.*

that are common to all land use decisions. It walks through the typical decision-making process—from design and drafting ordinances to issuing a final decision and hearing appeals—and identifies practical strategies to reduce the risk of litigation.

In offering these strategies, this publication is more than just a risk management checklist. Rather, it's a manual for good public decision-making. Indeed, the ultimate goal is for each community to combine a well-designed general plan and ordinances with sound due process and public engagement strategies in order to have a fully functioning, informed decision-making process.

A Risk Management Checklist

- ✓ Establish codes of conduct and procedure – See Chapter 7
- ✓ Articulate clear direction to applicants – See Chapters 2, 6
- ✓ Improve community education – See Chapter 6
- ✓ Process requests in a timely manner – See Chapter 6
- ✓ Draft clear ordinances – See Chapter 3
- ✓ Define decision-making criteria – See Chapter 7
- ✓ Create an excellent administrative record – See Chapter 4
- ✓ Write a well-supported staff report – See Chapter 5
- ✓ Comply with all published notice requirements – See Chapter 2
- ✓ Encourage pre-application meetings – See Chapter 7
- ✓ Act as an unbiased fact finder – See Chapters 2 and 7
- ✓ Develop written hearing procedures – See Chapter 7
- ✓ Apply law to the facts – See Chapter 7
- ✓ Ensure process for eliciting relevant facts – See Chapter 7
- ✓ Fairly weight strong neighborhood opposition – See Chapter 7
- ✓ Prepare well-written findings – See Chapter 8
- ✓ Review appeals procedures – See Chapter 9

PARATRANSIT — Sacramento

CHAPTER 2

Designing Decision-Making Procedures

IN THIS CHAPTER

Legislative vs. Quasi-Judicial: What Type of Decision Is It?

Civic Engagement for Legislative Decisions

Procedural Requirements for Legislative Acts

Process Design for Quasi-Judicial Decisions

People relate to land use decisions—and are often passionate about them—because of the impact these decisions have on their physical surroundings. Adherence to standard procedures assures that constitutionally and statutorily created due process rights are met even in the most heated of debates.

As a result, procedures should be designed to promote timely and meaningful participation, permit adequate review, eliminate redundancy, minimize delay, and result in actions that further the goals of the general plan. Good procedure design limits the risk of litigation and provides the community with greater confidence in government decision-making.

Legislative vs. Quasi-judicial: What Type of Decision Is It?

The type of decision that is being made by the agency dictates the procedural requirements for that decision. Most land use decisions are either "legislative" or "quasi-judicial."

Legislative decisions involve policy choices that apply to a broad class of landowners.[1] Examples include the adoption of general plans or zoning ordinances. Courts show greater deference to these decisions because the legislative process provides its own checks and balances. Thus, courts will only invalidate legislative acts under two conditions: when they fail to follow required procedures or when they are wholly irrational, arbitrary, or entirely lack evidentiary support.[2] Put another way, a legislative action will be upheld if it bears a reasonable relationship to the public welfare and appropriate procedures have been followed.[3]

In contrast, quasi-judicial decisions (also called adjudicative or administrative decisions) involve individual applications that are being considered for approval. Examples include granting a conditional use permit or a tentative map application. Here, broad policies are being applied to a specific parcel or project. The procedural requirements are more stringent because the local agency is acting more like a court: there is a hearing, evidence is taken, and the decision-maker is vested with discretion to determine the facts and make findings.[4]

Courts scrutinize quasi-judicial decisions more closely. An action may be overturned if the agency (1) exceeded its authority; (2) failed to provide a fair hearing; or (3) or made a decision not supported by substantial evidence (also called "a prejudicial abuse of discretion").[5] The primary difference between the legislative and quasi-judicial standard is the substantial evidence standard: courts look beyond whether the decision was "reasonable" (the legislative standard) and look to see that the decision is supported by substantial evidence.[6]

Adjudicative and Legislative Acts

ADJUDICATIVE ACTS

- Conditional Use Permits
- Variances
- Coastal Development Permits
- Subdivision Maps
- Williamson Act Cancellations
- Certificates of Compliance
- Development Allotment per Growth Control Ordinance
- General Plan Consistency Determinations
- Habitat Conservation Plan Amendments

LEGISLATIVE ACTS

- Airport Land Use Plans
- Water District Annexations
- Planned Unit Developments
- Zoning and Zoning Amendments
- General Plan Adoptions
- Special Assessment Establishment
- Road Abandonment
- Specific Plans
- Habitat Conservation Plans

[1] *See Ensign Bickford Realty Corp. v. City Council*, 68 Cal. App. 3d 467, 474 (1977).

[2] *See* Cal. Civ. Proc. Code § 1085.

[3] *California Hotel & Motel Association v. Industrial Welfare Commission*, 25 Cal. 3d 200 (1979).

[4] Cal. Civ. Proc. Code § 1094.5(a).

[5] *See* Cal. Civ. Proc. Code § 1094.5.

[6] Cal. Civ. Proc. Code § 1094.5; *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974); *Rasmussen v. City Council*, 140 Cal. App. 3d 842, 848 (1983); *Paoli v. California Coastal Commission*, 178 Cal. App. 3d 544, 550-51 (1986).

There is also a third classification: ministerial decisions. These are mandatory, nondiscretionary actions where the agency must grant (or deny) an application based on the presence (or absence) of a predetermined set of conditions.[7] An example would be a final map approval under the Subdivision Map Act, where the agency may only determine whether or not the applicant has met the conditions in the tentative map.

Though important, ministerial decisions are not discussed in further detail in this publication. This is not to say that risks are not present. For example, failing to take the appropriate ministerial action may subject to decision-maker to liability under the Tort Claims Act.[8] But they do not pose the same risks associated with the typical legislative and quasi-judicial land use decisions that are the focus of this publication.

Civic Engagement for Legislative Decisions

Local agencies are increasingly turning toward more participative models of decision-making, particularly for the development and implementation of general plans, zoning ordinances, and other legislative acts. Citizens advisory committees, stakeholder processes and other non-conventional hearing formats are all methods that create greater civic involvement.

These strategies are also excellent risk management tools. They can lead to more informed decisions and greater public confidence in agency decision-making. Greater involvement also generates more realistic expectations by the public. Indeed, public hearings are sometimes ill suited to truly engaging the public. Members of the public sometimes comment that the timing of the hearing—at the end of the process just prior to the final vote—makes them feel like they had little ability to affect or shape the final project. Such frustration can lead to litigation.

Public engagement also leads to more developed thinking about solutions: ideas that have been vetted through various community groups and participation processes are less likely to include provisions that will unfairly regulate the use of land. There is some evidence that courts look upon such processes favorably. In one contentious case involving a developer association's challenge to an inclusionary housing ordinance, a court of appeal noted favorably that the ordinance had been developed after consultation with a community advisory committee that counted several developers among its members.[9]

Procedural Requirements for Legislative Acts

Legislative acts are usually adopted by ordinance. One exception, however, is the general plan, which is adopted by resolution.[10] Resolutions are less formal than ordinances and become

Public Involvement Resources

Good public participation does not just happen. It requires time, thought and funding. Here are three Institute for Local Government resources for more information:

- Collaborative Governance Initiative (www.ca-ilg.org/cgi)
- *Getting the Most Out of Public Hearings: Ideas to Improve Public Involvement* (www.ca-ilg.org/publichearings)
- *Planning Commissioner's Handbook*, Chapter 3 (Public Participation) (www.ca-ilg.org/planners)

[7] *Rodriguez v. Solis*, 1 Cal. App. 4th 495 (1991). Typical examples include approval of a final subdivision map and issuance of building and occupancy permits. *Youngblood v. Board of Supervisors*, 22 Cal. 3d 644 (1978); *Thompson v. City of Lake Elsinore*, 18 Cal. App. 4th 49 (1993).

[8] *See* Cal. Gov't Code §§ 810 and following.

[9] *Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001).

[10] See Cal. Gov't Code § 65356.

effectively immediately (as opposed to ordinances, which become effective 30 days after adoption). However, both are considered legislative acts and must meet minimum procedural requirements in order to become effective:

- **Meeting and Agenda Requirements.** The Brown Act requires that most legislative acts (there is an exception for urgency ordinances) must be adopted at a regular, noticed meeting where the public can participate and comment.[11] The primary notice requirement under the Brown Act requires that the meeting agenda be posted in a way that is accessible to the public and describes the time, location, and subject matter of the meeting.[12]
- **Public Hearing.** The local agency must also hold a public hearing,[13] usually at a regular scheduled meeting of the legislative body. The hearing notice and publication requirements extend beyond those of the Brown Act. The notice should include the date, time, and place of the hearing, the identity of the hearing body or officer, a general explanation of the matter to be considered, and a general description, in text or by diagram, of the location of the real property, if any, that is the subject of the hearing.[14] Typically, notice is provided by public postings and publication in a local newspaper.[15]
- **California Environmental Quality Act (CEQA).** Additional notice and comment provisions are required in order to comply with CEQA where an ordinance or action constitutes a "project" within the meaning of that law.[16]
- **Two Readings.** Zoning ordinances (or amendments to zoning ordinances) generally require two readings: one to introduce the ordinance and a second to adopt the ordinance.[17] Ordinances must be read in full at the time of introduction or passage, unless a majority of the body waives the requirement.[18]
- **Majority Vote.** A majority vote of the total membership of the governing body is required to adopt an ordinance or a resolution.[19]
- **Findings.** Findings are generally not required for legislative acts, though they are sometimes required by statute in specific instances. Examples include when a general plan or ordinance limits the number of newly constructed housing units or when very low-, low-, or moderate-income housing is disapproved.[20] Findings are required for adopting a general plan if it includes provisions that limit the number of housing units that can be built.[21]
- **Publication and Effective Date.** Resolutions ordinarily take effect immediately.[22] Unless state law directs otherwise, however,

[11] Cal. Gov't Code §§ 54950 and following, § 25131 (counties); and § 36934 (cities); McQuillin, *Municipal Corporations* § 16:29 (3d rev. ed. 2004). *See also* League of California Cities, *Open & Public III: A User's Guide to the Ralph M. Brown Act* (2000).

[12] Cal. Gov't Code § 54954.2(a).

[13] Cal. Gov't Code §§ 65350 and following (general plans); Cal. Gov't Code § 65453 (specific plans); Cal. Gov't Code § 66451.3 (subdivisions) and Cal. Gov't Code §§ 65854, 65856 (zoning ordinances).

[14] Cal. Gov't Code § 65094.

[15] *See* Cal. Gov't Code §§ 65090-91.

[16] *See, e.g.*, Cal. Pub. Res. Code §§ 21092 - 21092.6 (negative declarations and environmental impact reports).

[17] Cal. Gov't Code §§ 25131 (counties); 36934 (cities). An ordinance passed in violation of statutory procedures is invalid, regardless of the subject matter. *National Independent Business Alliance v. City of Beverly Hills*, 128 Cal. App. 3d 13, 22 (1982).

[18] Cal. Gov't Code §§ 25131 (counties); § 36934 (cities); McQuillin, *Municipal Corporations* § 16:29 (3d rev. ed. 2004).

[19] Cal. Gov't Code §§ 25005 (counties); 36936 (cities).

[20] *See* Cal. Gov't Code §§ 65589.5, 65302.8, and 65863.6.

[21] Cal. Gov't Code § 65302.8.

[22] *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765 (1990).

ordinances take effect on the 31st day after adoption.[23] Ordinances must also be published within 15 days of passage in a local newspaper of general circulation. If there is no newspaper in the community, the ordinance must be posted in at least three public places.[24]

- **Urgency Ordinances.** Ordinances are immediately effective when *necessary* to preserve the public peace, health or safety. The urgency must be explained in a declaration and win approval by a four-fifths vote.[25] Some agencies adopt an identical "back up" ordinance through the usual procedure (two readings). If the urgency ordinance is challenged, the non-urgency version of the ordinance will have already taken effect.
- **Interim Ordinances or Moratoria.** Interim ordinances are typically used to prohibit a use that conflicts with a contemplated zoning proposal that is under consideration. They require a four-fifths vote and may be extended up to a maximum of two years.[26]

Failure to comply with state law procedural requirements typically invalidates the ordinance,[27] although in some instances the agency must be given the opportunity to cure the violation.[28] As a general rule, however, violation of local procedural rules does not invalidate the action.[29]

Process Design for Quasi-Judicial Decisions

Quasi-judicial decisions, such as project approvals, require a formal hearing where evidence is taken. The decision-maker (usually the planning commission or zoning administrator) is vested with the discretion to apply the legal standards or policy criteria and make determinations. Although the procedural requirements are stricter, public engagement techniques may still be used to help gather neighborhood sentiment, or allow a design review committee the opportunity to preview a project before it takes final shape. However, they should either be voluntary (on the part of the applicant) or be designed in a way that offers the applicant an ability to respond to all the information that is collected.

Notice and Limiting the Scope of Potential Litigation

Agencies can limit their exposure to appeal to only those issues raised during the administrative process (thereby preventing the filing of new claims or arguments) by including the following phrase (or substantially similar language) in the public notice:[30]

> "If you challenge the *[insert nature of proposed action; for example: general plan amendment]* in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the *[insert public agency conducting the hearing]* at, or prior to, the public hearing."

1. Notice

Typically, all owners of property within a radius of 300 feet of the property should receive notice by mail of a pending application at least 10 days

[23] Cal. Gov't Code §§ 25123 (counties); 36937 (cities).

[24] Cal. Gov't Code §§ 25124 (counties); 36933 (cities).

[25] Cal. Gov't Code § 36933. *Parr v. Municipal Court*, 3 Cal. 3d 861, 868 (1971) (invalidating urgency clause with discriminatory language).

[26] Cal. Gov't Code § 65858.

[27] *National Independent Business Alliance v. City of Beverly Hills*, 128 Cal. App. 3d 13, 22 (1982); *City of Colton v. City of Rialto*, 230 Cal. App. 2d 174, 180 (1964); *See* Cal. Gov't Code §§ 54960, 54960.1 (the district attorney or any interested person may sue either to prevent violations or to have past actions declared null and void).

[28] *See* Cal. Gov't Code § 54960.1(b), (c)(1) (violations of open meeting laws).

[29] *City of Pasadena v. Paine*, 126 Cal. App. 2d 93, 96 (1954) (resolution valid where read by title only, although rules required full reading).

[30] Cal. Gov't Code § 65009(b)(2).

before the hearing.[31] In some instances, local agencies increase notice radius to 500 feet or some other measurement.[32] The notice of the hearing must adequately describe the action under consideration. For example, one notice for a variance was held inadequate because the notice only described it as a variance for a garage and failed to note the second unit above the garage.[33] Courts view inadequate notice as equivalent to providing no notice at all.[34]

2. Fair Public Hearing

Decision-makers must base their decision on the facts that are presented to them as part of the quasi-judicial process, just as a court bases its decision on the evidence presented at trial. Public hearings are often the forum where all the evidence is presented. Hearings are often conducted as part of a regular meeting of the decision-making body. The procedure employed must be fair and accord applicants and others with an interest in the matter a meaningful opportunity to prepare, be heard, and rebut evidence. The process must include some basic safeguards:

- **Decision-Makers Must Be Present For All Evidence.** Anyone involved in making the decision must have heard all the evidence. This becomes an issue if a member of the decision-making body misses a meeting where evidence is presented, but the vote is postponed to a later meeting. While the best practice is to be present for all hearings, in some cases the member may still vote after reviewing the tape or testimony of the earlier meeting, reading all documents involved, reviewing all aspects of the issue presented, and stating on the record that such review and examination was completed.[35]

- **Decision-Makers Should Avoid Ex Parte Contacts.** An *ex parte* communication occurs when a decision-maker receives information—by meetings on the street, phone calls, and even e-mails—outside of the quasi-judicial process (*ex parte* is Latin for *"from one side only"*). Reliance on information received in this way can be unfair because the opposing parties are not there to rebut the information. Decision-makers should avoid outside contacts that could support a claim of bias.[36] Care should also be taken not to use outside contacts to develop a consensus on an issue outside the hearing room.[37] If an *ex parte* contact occurs, the affected decision-maker should disclose the contact and the substance of the communication at the hearing prior to receipt of public testimony. This will get the evidence shared during the contact into the record. Many agencies adopt formal policies governing these kinds of contacts.

[31] Cal. Gov't Code § 65091 (different timelines and procedures may apply in charter cities).

[32] *Id. See Horn v. County of Ventura*, 24 Cal. 3d 605, 612 (1979).

[33] *Drum v. Fresno County Department of Public Works*, 144 Cal. App. 3d 777 (1983); Cal. Gov't Code § 65094.

[34] *See Drum v. Fresno County Department of Public Works*, 144 Cal. App. 3d 777, 782 (1983).

[35] Daniel J. Curtin, Jr., & Cecily T. Talbert, *Curtin's California Land Use and Planning Law* (Solano Press, 2004 ed.).

[36] *See Nasha v. City of Los Angeles,* 125 Cal. App. 4th 470 (2004).

[37] Cal. Gov't Code 54952.2(b).

- **Informal Site Visits Raise Concerns.** Staff will often do a site visit for significant projects as part of its analysis for the staff report. However, decision-makers also sometimes visit a project site. This raises fairness concerns because the decision-maker may draw a conclusion outside of the hearing. Though some argue the better option is to avoid such visits altogether, many local agencies require that decision-makers disclose any site visits that they may have made—along with any conclusions they drew from such visits—at the beginning of the hearing prior to public testimony. Decision-makers should check with the agency's attorney to see what procedures may apply. Some legislative bodies schedule field trips as adjourned regular meetings to review a project site.

Finally, to the extent that local agencies rely on outside hearing officers to make certain kinds of quasi-judicial decisions, they must take care that the hearing officer does not have a financial interest in making favorable decisions for the agency. One court questioned the underlying fairness of a system where the agency hired its own hearing officers because the paid hearing officer had a financial interest in future adjudicative work from the agency and therefore could be tempted to make decisions in the agency's favor.[38] This problem can be avoided by entering into a pooling arrangement with other agencies to function as advisers for each other when the need for hearing officers arises, using in-house hearing officers, contracting with the State to use administrative law judges or a private mediation service to use retired judges, or engaging hearing officers on a long-term contract.

In short, the lesson is to design and implement processes that create a level playing field for all interested parties. Courts are likely to look closely at actions that have the appearance of prejudice, even where none actually exists.

3. Managing Testimony and Evidence

Public hearing procedures must allow all interested parties a fair opportunity to present evidence supporting their position.[39] Evidence may include documents, pictures, and witness testimony. The credibility of witnesses, and the weight to be given the evidence, are also within the agency's discretion. Local procedures vary, but can address the following issues:

- **Informal Rules of Evidence.** Local agencies need not follow the formal rules of evidence used by courts.[40] All locally adopted rules and policies, however, should be referenced in the hearing notice. A good practice is to develop some guidelines about the form in which evidence may be submitted in order to avoid submission of long videotapes or irrelevant material that is impractical, due to time and resource constraints, for the decision-maker to fully consider. Such procedures should be written carefully, however, so as not to inadvertently exclude relevant information. The presence of such rules should also be referenced in the hearing notice so that the public can make appropriate preparations.

Steps in A Typical Hearing[41]

- Staff presents a report to the decision-making body
- Staff takes questions from the decision-makers
- Public hearing is opened
- Applicant, or project proponent, makes a statement
- Other supporters and opponents makes statements
- Applicant makes a rebuttal or closing statement
- Decision-maker deliberates
- Decision is made

[38] *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002).

[39] *See Cohan v. City of Thousand Oaks,* 30 Cal. App. 4th 547 (1994) (council violated applicant's due process rights when it waived notice requirements and limited applicant's opportunity to speak).

[40] Cal. Gov't Code § 65010.

[41] *See, for example,* County of Kings, Cal., Code § 1806 (1996).

- **Managing Testimony.** The individual right to be heard must be balanced against the public interest in fair but efficient hearings.[42] Agencies may place reasonable restrictions on the length of testimony. Typical methods include providing each person a short period (usually 3 minutes) to speak or providing each side a certain period of time (30 minutes) to make their case. The applicant often makes an opening statement, but is also the last to speak to afford the opportunity to rebut any adverse evidence. The agency has the discretion to refuse repetitive or irrelevant evidence, and forbid disruptive behavior.
- **Collect Evidence for the Record.** All written and pictorial evidence presented at the hearing should be collected. The hearing notice should advise those who wish to present evidence to provide copies to the agency and the opposing party prior to the hearing. Anything not admitted into the record at the hearing should not be used in making the decision.

Facts and Evidence

The record upon which a decision is made is often made up of more than just facts. Evidence may also be considered. An example of evidence would be an expert opinion offered by a specialist or consultant. The expert's conclusion is usually an opinion drawn from the expert's view of the facts. A local agency may reasonably rely on such opinions in making its final determination. Another example of evidence is the testimony of surrounding residents expressing support or concern even though their opinions may not be supported by independent facts in the record.

- **Cross Examination.** Allowing opponents to cross examine one another is generally not standard in land use hearings and, to the extent it is used, is generally limited to specific circumstances, such as when an "expert" is invited to make a presentation. Otherwise, the prospect of cross-examination may have a chilling effect on public participation that deprives the decision-making body of important information.[43]

The important thing from a process design standpoint is to have a fair system in place so that when controversies do arise, the losing party does not feel like the process affected the outcome.

4. Improper Combination of Functions

Additional process requirements affect enforcement actions—such as nuisance abatement and permit revocations (as opposed to simply evaluating permit applications). Here, the agency's attorneys must avoid advising the staff enforcing policy, *and then* advising the ultimate decision-maker. Two court decisions have addressed this issue:

- An attorney who played an active role in revoking an adult business license could not advise the hearing officer assigned to adjudicate the appeal of the revocation.[44]
- An attorney who occasionally provided advice for a board could not also prosecute disciplinary actions before that board.[45]

The underlying theme is that the role of an advocate is inconsistent with the role of a decision-maker. The problem may also arise with non-lawyer staff.[46] Thus, enforcement staff should not directly advise adjudicatory officials. Likewise, if a decision is subject to multiple levels of review, it may be inappropriate to have the lawyer who advised the lower tribunal advise the higher one.[47]

[42] Dwight Merriam & Robert Sitkowski, *Procedural Due Process in Practice*, *Planning Commissioners Journal* (Summer 1998).

[43] *Id.*

[44] *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81 (2003).

[45] *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 810 (2003).

[46] No case has yet addressed this issue. *See* Michael Jenkins, *How Many Lawyers Does It Take To ... ? An Analysis of Nightlife and Quintero, Western City* (May 2004).

[47] *Howitt v. Superior Court*, 3 Cal. App. 4th 1575 (1992).

To date, this rule has only been applied when an agency is *enforcing* or *prosecuting* an ordinance. It has not been applied when an agency is *evaluating* or *processing* discretionary permits, environmental decisions, or subdivision applications. As a result, the attorney (or staff) who works on processing a permit should also be able to advise decision-makers like the planning commission on the project.

But agencies acting in a prosecutorial or enforcement capacity should adopt appropriate safeguards.[48] One practice would be to create an "ethical wall" by not allowing prosecutorial and advisory staff to discuss specific cases or policies. Thus, one person neither knows about nor affects anything the other is doing as to the matter.[49] This is a simple approach, but probably not practical for smaller agencies with less staff. Even for larger agencies, it may be difficult to ensure consistency if a senior lawyer cannot supervise a junior attorney on a specific action.

The alternative is to avoid providing legal advice at the lowest prosecutorial level. Under this method, attorneys provide only generalized advice to enforcement staff and cannot provide advice on specific cases. With this approach, any legal problems could be reviewed and corrected at the adjudicative level. The disadvantage is that the absence of specific legal advice may hinder enforcement. Finally, if the agency believes that advice at the prosecutorial or investigative level is critically important, the agency can employ outside counsel to provide that advice and the agency's counsel can advise the decision-makers during the adjudicatory phase.

5. Issuing a Decision

The local agency should issue its final decision in writing, usually soon after the public hearing. The timing and service of this notice begins the tolling of the statute of limitations—or the time in which the action may be challenged in court. The required notice should be given whether the action approves or denies the application. Challenges to quasi-judicial decisions must generally be filed within 90 days of the date that the agency's decision becomes final.[50] The notice of the final decision should include a statement that the amount of time in which judicial review may be sought is governed by California Civil Procedure Code section 1094.6.[51]

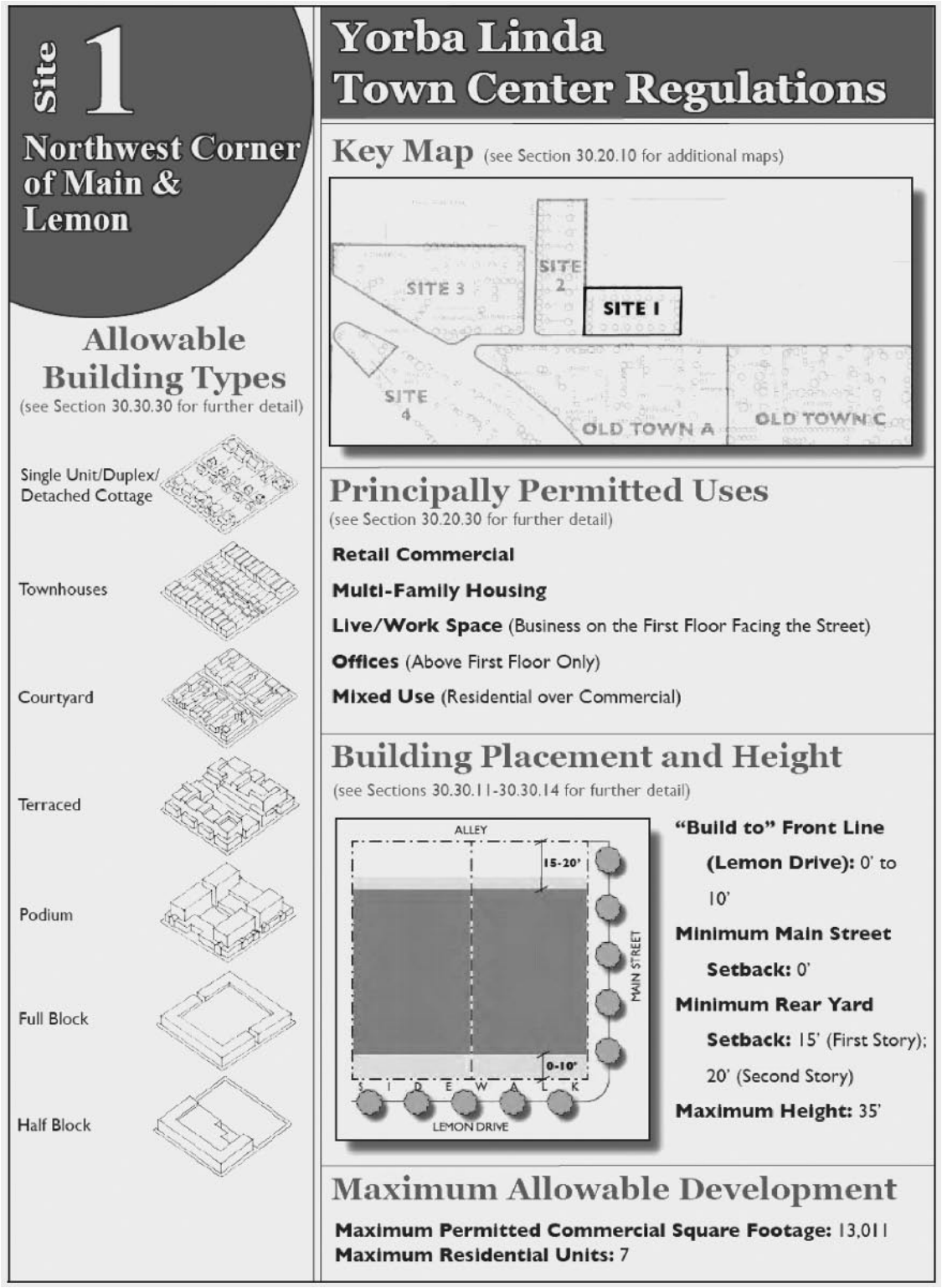
It is also a good practice to announce on the record after the decision any local time limits for appealing the decision.

[48] These practices are excerpted from a report drafted for the City Attorneys Department of the League of California Cities by its Due Process Committee. A copy is posted at *www.ca-ilg.org/procedures.*

[49] *Howitt v. Superior Court*, 3 Cal. App. 4th 1575 (1992) (county had burden of establishing that attorney advising appeals board was segregated from attorney representing the department that terminated employee).

[50] Cal. Civ. Proc. Code § 1094.6(b). But a shorter limitation may apply. Cal. Civ. Proc. Code § 1094.6(g). *See, for example*, Cal. Pub. Res. Code § 21167; Cal. Gov't Code § 65009.

[51] Continuing Education of the Bar, *California Administrative Mandamus* §7.11 (2nd ed. 2002).



A good example of taking the extra step of formatting legislation in a way that makes it easy to use and apply.

CHAPTER 3

Adopting Legislation

IN THIS CHAPTER

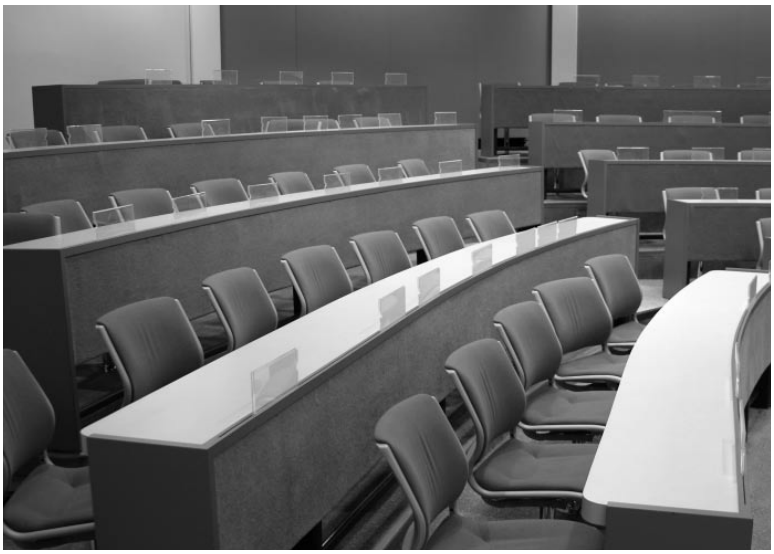
Determination of Authority

Scope of Legislative Action

Considerations In Regulatory Design

Clear Wording

Responsibility for Drafting



Most elements of the general plan are implemented through zoning ordinances. Ordinances are legislative acts because they establish policies that apply to a broad range of parcels or applicants. Well-drafted legislation does what the local agency intends it to do—nothing more, nothing less. Poorly drafted legislation, on the other hand, can be interpreted in unintended ways and increase the risk of litigation.

Determination of Authority

The first step in drafting an ordinance is making sure that the agency has the authority to legislate. The authority to regulate land arises from the "police power" to protect the public's health, safety and welfare.[1] In California, this power is passed to cities and counties, which can make and enforce such laws to the extent that they do not conflict with the laws of the state.[2] Courts have traditionally construed the police power to authorize local land use regulation.[3]

[1] The police power is inherent in a sovereign government. This power is reserved for states in the Tenth Amendment to the United States Constitution. *See also Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (holding that local governments may protect the general welfare through enactment of residential zoning ordinances).

[2] Cal. Const. art. XI, § 7. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

[3] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 886 (1985).

The police power is also "elastic," meaning that it is flexible enough to meet the changing conditions of society.[4] Thus, actions that might not have been thought of as promoting the general welfare a century ago (like actions to assure aesthetic character, perhaps) are within the purview of the general welfare today. Courts have found that a wide variety of local concerns legitimately fall within the general welfare, including growth management.[5]

But there are limits to the police power. One of the primary limits to this power is the caveat that local laws may not conflict with state law. An example is the state "anti-NIMBY" law, which prohibits local agencies from denying affordable housing projects unless specific findings can be made. A more complex example is the second unit or "granny flat" law, which requires local agencies to adopt processes to approve second unit applications ministerially, without discretionary review or a public hearing.[6] Agencies that do not

Statutory Limitations

The state has imposed many specific limitations on the exercise of local zoning power. The following are some examples.[7]

- **Residential Zoning.** Sufficient land must be zoned for residential use based on how much land has been zoned for non-residential use and on future housing needs. A small exception applies to built-out communities.
- **Second Units ("Granny Flats").** Qualifying second unit applications are not subject to discretionary review.
- **Density Bonuses/Affordable Housing.** Projects that include certain percentages of affordable units must be allowed to build at densities 10 to 35 percent greater than the maximum allowed under a zoning ordinance.
- **Group Homes and Child Care Facilities.** Day care facilities for six or fewer children licensed under the Community Care Facilities Act must be treated as single-family residences. In addition, residential facilities serving six or fewer persons must also be considered equivalent to conventional single-family uses. The law also requires cities and counties to treat large family day care centers as single-family homes.
- **Coastal Zone.** Land in the coastal zone cannot be developed without a coastal development permit.
- **Solar Energy Systems.** Local agencies, including charter cities, may not unreasonably restrict the use of solar energy systems in a way that significantly increases cost or decreases efficiency.
- **Discrimination.** Ordinances that deny rights to use or own land or housing based on ethnic or religious grounds are illegal.
- **Manufactured Homes.** Manufactured homes cannot be prohibited on lots zoned for single-family dwellings.
- **Timber and Agricultural Land.** Farm and timber lands that are enrolled in special zones or preserves—which provide tax breaks in return for the promise to keep the land in agricultural or timber production—may not be developed without payment of a penalty. For agricultural lands, additional controls may include a prohibition on annexation while the land is enrolled in such programs.
- **Psychiatric Care.** Zoning ordinances may not discriminate against general hospitals, nursing homes, and psychiatric care and treatment facilities.
- **Billboards and Signs.** Outdoor advertising displays cannot be removed without payment of just compensation. Reasonably sized and located real estate "for sale" signs must also be permitted.
- **Surplus School Sites.** If all public agencies waive their rights to purchase a surplus school site, the city or county with jurisdiction over the site must zone the property in a way that is consistent with the general plan and compatible with surrounding land uses.

[4] *Euclid v. Ambler Realty Company*, 272 U.S. 365, 387 (1926), *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[5] *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995).

[6] Cal. Gov't Code § 65852.2.

[7] *See* Cal. Gov't Code § 65913.1 (residential zoning); Cal. Gov't Code § 65852.1 (second units); Cal. Gov't Code § 65915 (density bonus); Cal. Health & Safety Code §§ 1566.3, 1597.45 & 1597.46 (group homes and child care facilities); Cal. Gov't Code § 65850.5 (solar energy); Cal. Gov't Code § 65852.3 (manufactured homes); Cal. Gov't Code §§ 51100 and following (timberland); Cal. Gov't Code §§ 51200 and following (agricultural land); Cal. Welf. & Inst. Code § 5120 (psychiatric care); Cal. Bus. & Prof. Code § 5412 (billboards); Cal. Civ. Code § 713 (signs advertising real property); Cal. Gov't Code § 65852.9 (surplus school sites).

Best Practices: Minimizing the Risk of Preemption Arguments

- Consult with the agency's attorney about the degree to which state or federal law addresses a problem facing the community.
- Through legislative findings or staff reports:
  - Explain why the agency's regulation achieves significant public purposes historically within the police power.
  - Emphasize purposes for local regulations that are separate and independent from purposes emphasized in state or federal regulations, or both.
  - Highlight, when relevant, the ways in which the local regulation addresses a local problem that varies from jurisdiction to jurisdiction.
  - Identify any language in the federal or state statutes, regulations or legislative or regulatory history that leaves room for related or supplemental local regulation and then explain how the local regulation fits into that category.
  - Describe how the local regulation addresses issues traditionally considered to be subject to local control.
  - Demonstrate why the agency's regulation is compatible with or furthers any existing state or federal laws in the area.

adopt such procedures must approve all second unit applications ministerially according to a set of state standards. Conflicts with federal laws can also prevent local action.

Not surprisingly, determining whether and to what extent an agency may be precluded from acting on certain issues can involve a complex analysis. Sometimes state or federal law is not clear on the extent to which it precludes local regulations. Agency attorneys will apply slightly different tests when determining whether state or federal law preempts local legislation:

(1) Congress demonstrates its intent to occupy the field of regulation and supplant state or local authority (federal standard).

(2) The state or local law may conflict with federal law by making it impossible to comply with federal law or by creating an obstacle to the goal of the law (federal standard).[8]

(3) A local law conflicts with state law when it duplicates, contradicts, or enters a field which has been fully occupied by state law, whether expressly or by legislative implication (state standard).[9]

Sometimes state and federal laws leave room for more stringent local regulation, either expressly or by implication. State and federal law can often be viewed as a baseline requirement allowing the adoption of additional local standards. This is particularly the case for most planning and zoning laws, where the state has found that such laws impose a minimum limitation and that local agencies may exercise the "maximum degree of control over local zoning matters."[10]

Nevertheless, there are a number of areas, such as telecommunications, affordable housing, habitat conservation, and other environmental regulations, where the scope of controlling federal or state law is quite extensive. Thus, it is advisable to consult early on with agency counsel to ensure that a proposed regulation is within the agency's authority to enact and does not conflict with state or federal law.

Finally, charter cities have additional authority to enact laws that conflict with state law if those laws fall into the specific category of "municipal affairs," or matters of local, as opposed to statewide, concern.[11] Of course, charter city enactments cannot conflict with the charter itself—charters generally contain limits on local legislative authority.[12]

[8] *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

[9] *People ex rel. Deukemejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984); *Candid Enterprises, Inc. v. Grossmont Union High School District*, 39 Cal. 3d 878, 885 (1985); *California Federal Savings and Loan Association v. City of Los Angeles*, 54 Cal. 3d 1 (1991).

[10] Cal. Gov't Code § 65800.

[11] *See* Cal. Const. art XI, § 5(a); *California Federal Savings and Loan v. City of Los Angeles*, 54 Cal. 3d 1, 13 (1991) (rejecting static and compartmentalized description of municipal affairs).

[12] *City of Glendale v. Tronsden*, 48 Cal. 2d 93, 98 (1957).

Scope of Legislative Action

The next step in the process is to develop a core set of drafting guidelines that describe the intended scope and objectives of the ordinance. Oftentimes, this type of information is developed through a civic engagement process. Typically, such guidelines include some or all of the following elements:

- **Goal.** What problem is the agency trying to solve? In the land use context, answering this question will typically involve an analysis of impacts of certain kinds of land uses and why they are either beneficial or detrimental to the community.[13]
- **Scope.** The extent to which the ordinance will apply should be clearly understood from the beginning. Often, there are particular types of projects or areas in which the ordinance should not apply.
- **Uniformity versus Flexibility.** There are instances where the local agency will want to treat every project the same. For example, courts are more likely to uphold local agency fees when they are applied equally to all landowners as opposed to when they are applied on a more individualized basis.[14] More flexibility, however, may be appropriate if each application is likely to have its own unique circumstances that will need to be addressed individually.
- **Specificity versus Discretion.** A related concept is whether to include every aspect of a regulatory program in an ordinance. This enables the program to be fully vetted politically. However, it can be challenging to anticipate every detail. The alternative is to draft ordinances to cover major purposes and key elements, and then delegate to staff the responsibility of preparing regulatory guidelines that flesh out the day-to-day details. Often, such implementation procedures or guidelines must still be approved by resolution. Publicizing such guidelines is important so that those who are subject to the regulations are aware of the full extent of their obligations.
- **Consistency with Existing Regulations.** Anytime an agency adds an ordinance to its code, the agency needs to consider how the new provisions affect existing regulations. A key goal is not to lose the benefit of desirable procedures and substantive provisions.[15] It can also be useful to include a provision specifying how any remaining, inadvertent conflicts should be resolved.

Considerations In Regulatory Design

The third step is to determine the overall design of the ordinance. Design elements affect how the regulation will be implemented and enforced. Thus, having a sense of how the provisions will work together will help at the drafting stage.

[13] Michael A. Zizka, Timothy S. Hollister, Marcella Larsen & Patricia E. Curtin, *State & Local Land Use Liability* § 3:2 (1997).

[14] *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

[15] Zizka et al., *supra* note 13, § 3:26.

Major elements include:

- **Locating Definitions.** A typical ordinance includes a definitions section at the very beginning. This often makes the most sense, particularly if it's the type of ordinance that will be circulated separately, like a sign ordinance. But many also work in tandem with other ordinances. Under these circumstances, including all land use definitions in one section of the zoning code promotes consistency through out the code.[16]

- **Locating Substantive Provisions.** Substantive provisions—or provisions that impose a duty, burden or obligation—should be located in the main provisions of the ordinance. They should not be hidden in definitions. The ordinance should be organized so that all the main obligations can be easily identified and located.

- **Integration with State and Federal Programs.** Be alert to the confusion that can be caused when a term used in a local ordinance has a different meaning under state or federal law. For example, assume an agency adopts a special housing assistance program that includes a definition for a "qualifying low-income household" as any family that makes less than $35,000 per year. This definition is confusingly similar to the federally defined "low-income household." It's usually better to follow existing state or federal definitions to minimize confusion. However, where the policy choice has been made to provide a benefit different from state and federal law, use a different term. In this example, a term like "City Housing Program Recipient" eliminates most confusion with state and federal government terms.[17]

- **Elements for Proof.** Consider the elements that must be proved to enforce the ordinance. For example, a prohibition that reads, "*homeowners may not landscape yards with nonnative trees*" requires proof of five elements. First, the homeowner (as opposed to a tenant) must have planted it. Second, the language implies that it must be part of a landscape plan (as opposed to planted randomly). Third, it must be within a "yard" (which may or may not include the entire lot). Fourth, the plant must not be native to the area (defined by whom or what list?). And fifth, what actually constitutes a tree may not be clear. A simpler approach would be: "*only trees from the city's Native Tree List may be planted on Residential Lots*." Here, a list of native trees incorporated by reference would reduce the inquiry to two elements: (1) existence of a non-listed tree (2) on a residential lot (presumably a designation in the zoning code). (This latter provision also eliminates a double negative.)

- **Variance Procedures.** Most zoning ordinances include a variance procedure. Variances provide a safety valve to assure that ordinances are applied in a way that is fair to all property owners. But variances also protect agencies from "facial" challenges to an ordinance.[18] A "facial" challenge usually seeks to invalidate an ordinance as written. In order to make such a challenge, the owner must show that it is impossible for the ordinance to be applied in a way that complies with the law. But this claim cannot be made when a variance is available, because it affords the agency the opportunity to change the ordinance's application to avoid an unconstitutional or illegal result.

- **Economic Variance Procedures.** In addition, a special economic variance can be used to protect against claims that a regulation amounts to a taking of property. This type of variance does more than just provide a second chance to review an ordinance. It also requires the challenger to submit additional information to demonstrate the alleged economic loss, which is necessary to determine whether a taking has occurred.

See sample economic variance at www.ca-ilg.org/takings.)

[16] *Id.* at § 3:13.

[17] *Id.* at § 3:25.

[18] *See for example Home Builders Ass'n v. City of Napa,* 90 Cal. App. 4th 188 (2001) (finding that the presence of a variance procedure defeated a facial takings claim).

Thus, the variance allows for a fully informed decision. If the agency determines that the regulation will indeed result in a taking if applied, it can grant the variance or alter the regulation. On the other hand, if the regulation does not constitute a taking, the variance helps ensure that the administrative record will contain facts that support the agency's decision.

- **Create Mechanisms to Ease Enforcement.** To the extent practicable, place all requirements into a single document or application to make it easier for staff to determine that all conditions have been met. For example, many inclusionary housing ordinances require that all the conditions of the ordinance be expressed in a single document that is recorded against the property. This does two things: first, it creates one point in the process to assure that all the conditions are met; and second, in recording the conditions, the agency assures that further financing and sale of the property will be conditioned on the local agency actions.

It's often helpful to map the regulatory design by creating a flow chart that starts with the regulatory goals and moves through the process of implementation. In most instances, the chart should integrate the relevant steps in the development approval process to ensure that the new ordinance complements existing regulations. The flow chart will help identify critical points where enforcement can most easily be managed. It can also be helpful in assigning responsibilities for the various tasks that will need to be undertaken to achieve the regulatory goal. Once completed, the flow chart can guide drafting.[19]

Clear Wording

A great deal of thought should be put into the terms and language used in the ordinance. An ordinance may not be enforceable if it cannot be reasonably understood.[20] Vague terms also increase the risk of inconsistency and misinterpretation, which can expose an agency to claims that the agency applied its laws in an arbitrary or

Drafting Tips

Use Plain Language. Be clear. Use short words, avoid jargon and legalistic language, and express thoughts in short sentences (17 to 25 words).

Avoid Double Negatives. Double negatives are confusing. For example, use "timely" instead of "not untimely." Often the double negatives that get through the first drafts are not immediately apparent because they are contained in separate clauses within a sentence.

Use Simple Definitions. Use dictionary definitions whenever possible and do not use definitions to change the commonly understood meaning of terms.[21]

Avoid "Shall" and "Shall Not." Many ordinances rely on the word "shall" to designate a responsibility or duty to take or refrain from taking action. But "shall" has several meanings, some of which are directory, not mandatory. Thus, "shall" can be interpreted to mean something closer to "should."[22] To avoid potential misinterpretations, use words like "must" and "will."

Identify the "Who" and the "What." Identify who will receive the benefit or burden created by the ordinance and what the benefit or burden is.

Draft for the Long Term. Outdated terms create confusion. For example, be cautious about singling out technologies (like GIS). Instead, focus on the end result.[23] Likewise, consider the potential for change when assigning responsibilities. Assign tasks to senior positions (or their designee), like a community services director, that are likely to survive a restructuring.

Don't Rush It. The process of adopting legislation involves an investment of agency and decision-maker time. Make optimal use of that time by doing the necessary groundwork to produce a clear document that achieves the agency's objectives.

[19] Zizka et al., *supra* note 13, § 3:30, apps. 3A-E.

[20] *Miller v. California*, 413 U.S. 15, 27 n.10 (1973) (finding that an ordinance must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding).

[21] Robert J. Martineau, *Drafting Legislation and Rules in Plain English* 25.(West Publishing Co., 1991).

[22] *Id.* at 79-80.

[23] Zizka et al., *supra* note 13, § 3:29.

discriminatory way.[24] The risk can be especially great when a regulation involves constitutionally protected rights—like free speech.[25]

There is no clear-cut formula, however, that will assure precision in every ordinance. Drafting is a craft. Repeated review and editing is a must. Fundamentally, legislative language should be so clear and exact that it can only be applied in a way that is consistent with the agency's intent.[26]

Thus, commonly used words or terms that may be subject to varying interpretations should be clearly defined. Ambiguities in language, however, can arise in surprising and unanticipated ways. For example, many local agencies have agricultural zoning regulations. But many do not define the term "agriculture" with a great degree of certainty. Consider the following examples:

- A landowner who runs a contract harvesting business builds a maintenance facility for his (and other) harvest equipment. Neighbors claim that the use is commercial, not agricultural.
- A biotech company maintains a herd of goats that it injects with proteins to research a cure for cancer. Neighbors claim that the use is medical, not agricultural.
- A tomato farmer decides to grow hothouse tomatoes and builds greenhouses on 100 acres of otherwise protected coastal farmland. Neighbors claim that this practice is contrary to the traditional definition of agriculture.

In each case, the questioned use arguably fits a broader definition of "agriculture," even though it was probably not what the drafter had in mind. On the other hand, the local agency may not want to regulate the every term so closely, and may elect to rely on the traditional (and evolving) use of a specific term like "agriculture." Of course, the drafter cannot anticipate all contingencies, but must nevertheless strive to anticipate when the agency will want the ordinance to apply and how those subject to the regulation may try to avoid the ordinance's application.

A Caution About Cut and Paste Drafting

It can be tempting to take an ordinance from another jurisdiction, make a few minor changes, and then forward it for approval. Looking for models from other jurisdictions is often a good starting point. But each jurisdiction has a different general plan, zoning code, housing requirements, and geography. Language conventions and definitions will also vary. To avoid drafting problems and litigation, any language pulled from another jurisdiction must be thoroughly reviewed and tailored to fit into the agency's own regulatory program.

Drafting clear definitions for key terms enables an agency to exactly describe the scope of the action. Some drafters wait until an ordinance is close to final form before drafting the definitions to avoid inadvertently leaving key terms undefined. It may also be helpful to have a layperson review the draft ordinance to determine whether all terms have been adequately explained.[27]

As with much of writing, one of the hardest parts of drafting is developing a first draft. In many instances, staff will look to see how other agencies have implemented similar policies (see sidebar "A Caution About Cut and Paste Drafting"). A process for fully vetting the drafts, however, assures that the first draft does not have to be perfect. Indeed, department heads and others will often provide better, more detailed comments in response to an "average" first draft. In other words, treat the first draft as just a starting point and rely on the review, comment, and editing process to take it the rest of the way.

[24] *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Zizka et al., *supra* note 13, § 3:23.

[25] *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

[26] Martineau, *supra* note 21, at 25.

[27] Zizka et al., *supra* note 13, § 3:13.

Elements of the Typical Ordinance

Title. The title should sufficiently advise the reader of the subject matter. The words "amending," "authorizing," or "repealing" denote the type of action to be taken.[28]

Scope. Limit each ordinance to one subject. If there is a question, it's better (albeit possibly more difficult politically) to offer two ordinances instead of combining them into one.[29]

Findings or Statements of Purpose. Findings are not usually required for legislative acts, but they can communicate the purpose behind the action if there is a question about how the ordinance should apply. However, courts exercise limited review of legislative acts;[30] hence, findings can also be limiting and unhelpful in defending an ordinance. When included, findings may either be listed in the accompanying recitals or included as part of the codified ordinance.

Ordaining or Enacting Clause. The form of the enacting clause is specified by statute. The enacting clause for cities is: "The city council of the City of _____ does ordain as follows:"[31]; for counties: "The Board of Supervisors of the County of _____ ordains as follows."[32]

Substantive Provisions. This section contains the regulatory program to be adopted.[33]

Special Clauses. Some ordinances also include special clauses that are not typically published with the rest of the ordinance but nevertheless affect how the ordinance is applied. A typical example is a clause that specifies when the ordinance becomes effective (if different than the typical 30 day waiting period).

Severability Clause. A severability clause states that if any part of the ordinance is found to be invalid or unconstitutional, the remaining sections will still be applied to the maximum extent practicable. A severability clause is not necessary if the ordinance will be codified and the code itself contains a generic severability clause.

Signature and Attestation. All city ordinances must be signed by the mayor and attested by the city clerk.[34] County ordinances must be signed by the chair of the board of supervisors and attested by the county clerk.[35]

Responsibility for Drafting

Generally, the agency's attorney has ultimate responsibility for ordinance drafting,[36] although the attorney can also play more of a reviewing role. The drafter should consult with all the departments—such as planning, finance, code enforcement, building inspection, and the fire department—that are likely to be involved in enforcing an ordinance.[37]

In addition, the actual drafting may be easier after the agency engages in a searching process of program design. For many land use ordinances, this would involve getting input from the planning commission and often the public generally through some kind of civic engagement process.

[28] International Institute of Municipal Clerks, *Manual for Drafting Ordinances & Resolutions* 3 (1998).

[29] Zizka et al., *supra* note 13, § 3:6; Martineau, *supra* note 21, at 39.

[30] *California Hotel & Motel Association v. Industrial Welfare Commission*, 25 Cal. 3d 200 (1979).

[31] Cal. Gov't Code § 36931.

[32] Cal. Gov't Code § 25120.

[33] Martineau, *supra* note 21, at 119.

[34] Cal. Gov't Code § 36932.

[35] Cal. Gov't Code § 25121.

[36] *See, e.g.,* Cal. Gov't Code § 41802 (requiring city attorney to frame all ordinances and resolutions required by the legislative body). There is no parallel statute that applies to county counsels.

[37] International Institute of Municipal Clerks, *supra* note 28 at 1.

CHAPTER 4

Building the Administrative Record

IN THIS CHAPTER

What Goes Into the Record

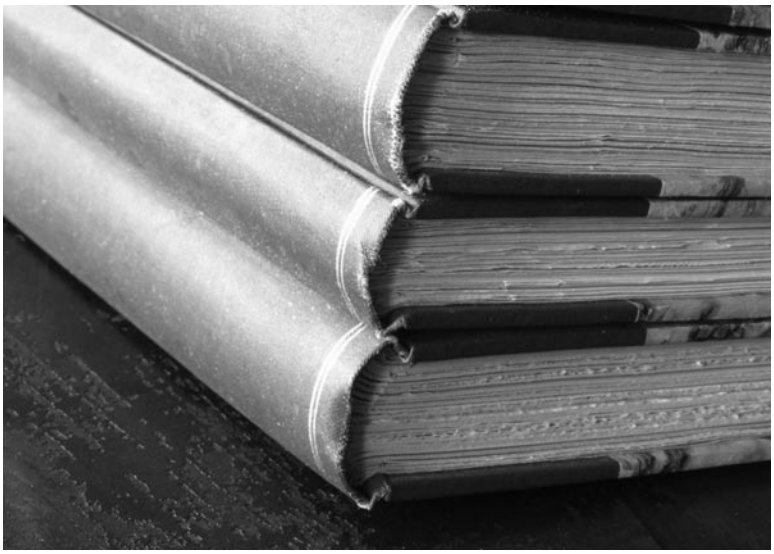
What Does Not Go Into the Record

Assembling the Record

Hearing Audiotapes and Transcripts

Organizing the Administrative Record

Final Review and Certification



Simple file and record keeping is important to good decision-making. It is also an essential element of managing the risk of land use litigation. In most cases, courts usually do not review a decision to see if the agency made the "right" decision; instead, they review the record to determine whether there was enough evidence to support the decision.

Thus, the ultimate objective for the administrative record is to assure that the evidence in which the decision-maker relied is recorded in a manner that will document how the decision was made.[1] Courts are reluctant to uphold the agency's decision without the entire record before them.[2] When a land use decision is challenged, the agency must organize all the documents and materials relevant to the decision to form an administrative record. This includes all written documents, testimony, photographs, maps and any other submitted evidence available to the decision-maker that could have influenced the final decision.

[1] Katherine E. Stone & Lisabeth D. Rothman, *Preparing a Defensible Administrative Record*, City Attorneys Department Spring Conference, League of California Cities (May 2004).

[2] *See, e.g., Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362 (2003). *Hothem v. City and County of San Francisco,* 186 Cal. App. 3d 702, 705 (1986); *Foster v. Civil Serv. Comm'n,* 142 Cal. App. 3d 444, 453 (1983).

What Goes Into the Record

The administrative record includes any document that was part of the official decision-making process (see sidebar "A Checklist for the Record"). Administrative records vary considerably in size depending on the decision being made. Granting a permit for a convenience store based on a negative declaration will generate a smaller record than certifying an environmental impact report and approving a general plan amendment, zone change and subdivision map for 2,000 residential units. Regardless of the size of the record, the agency should act with care to implement processes that will ensure that the record is complete and preserved. You never know when you might need a record.

Typically, the local agency will have systems in place to collect documents like staff memoranda, consultant reports, correspondence, and other broadly circulated documents. In land use cases, photographs are also useful for court proceedings. It is unlikely that the judge will be as familiar with the property as the decision-makers. If there is a site visit, this should be documented with photographs, maps, and perhaps a video. All evidence introduced at public hearings should also be copied and included for the record.

A number of other considerations go into compiling the administrative record:

- **Getting All Evidence Presented at Hearings.** Computer presentations and other demonstrative evidence like maps and visuals are often omitted because they were not collected. Some agencies require speakers to submit duplicates of all materials to the agency. Another policy is to require that presenters provide reduced (8½ x 11 inch) duplicates of large-scale maps and other exhibits. If actual duplicates are not practical (as for physical models of a project, for example), a list of all materials submitted into the record should be maintained.[3]
- **Seemingly "Unconsidered" Information.** The record should include all materials and other information presented to the decision-makers, even if some of the information did not play a role in the final decision. For example, a study that was produced by a consultant but ignored by the decision-makers should remain in the record. It is immaterial that the evidence was disputed or judged by the decision-makers to be of only marginal relevance.

A Checklist for the Record[4]

- ✓ Project applications
- ✓ Description of property or area at issue
- ✓ Relevant correspondence
- ✓ Public comments
- ✓ All staff reports
- ✓ All admitted exhibits
- ✓ Any rejected exhibits in the agency's possession
- ✓ Submitted written comments
- ✓ Minutes and transcripts of hearings
- ✓ Consultant reports
- ✓ Written testimony
- ✓ The final decision and notice thereof to the applicant[5]
- ✓ Oral evidence given at a hearing
- ✓ Plats, maps, plans, drawings, photographs, deeds, and surveys
- ✓ Records of mailed and published notices and orders
- ✓ Environmental review documents
- ✓ Relevant portions of the general plan, specific plans, zoning ordinances, and other policies
- ✓ Any proposed decision by a hearing officer
- ✓ The final decision embodied in an ordinance, resolution or statement of decision
- ✓ Any other relevant information

[3] Michael A. Zizka, Timothy S. Hollister, Marcella Larsen and Patricia E. Curtin, *State & Local Land Use Liability* § 9:7 (1997).

[4] Many statutes (like Government Code section 1054.6(c) and Public Resources Code section 21167.6(e)) require transcripts. Further, a transcript is generally necessary to demonstrate that the decision is supported by substantial evidence in light of "the whole record" and demonstrate exhaustion or failure to exhaust remedies.

[5] *See* Cal. Civ. Proc. Code § 1094.6(b) and (f).

Demonstrative photos, like this one, can be introduced into the record to underscore a point: here, the safety threat of not having adequate pedestrian walkways.

Reviewing courts are required to consider the entire record, not just those portions that the decision-maker deemed relevant.

- **Materials Incorporated By Reference.** Do not overlook documents that were not physically presented to the decision-makers in connection with the challenged decision, but are referred to or incorporated by reference in staff reports, environmental documents and other materials.
- **Supporting CEQA Documentation.** Include all technical studies and reports, such as traffic studies, noise studies, biological surveys, or archaeological reports, that provide the foundation for the analyses and conclusions in the environmental impact report or negative declaration.
- **Relevant Planning and Zoning Documents.** The record should also include relevant portions of the general plan, municipal code, and other policy documents.
- **"Official" E-mail Correspondence.** A review should be undertaken of e-mail correspondence between staff members and consultants participating on the project. E-mail may be appropriate for inclusion in the administrative record. Other staff e-mails that only reflect personal views are generally not included (see below).

Finally, the content of the record may differ depending on the whether the decision is legislative or adjudicative. Because courts generally defer to local legislative bodies on legislative issues, the record supporting such decisions need only demonstrate that the action was not unreasonable or arbitrary.[6] Records supporting quasi-judicial decisions, however, will contain more detailed evidence about how the agency applied its policies to a specific parcel. Here, the agency is acting more like a court, and the completeness of the record is critical. The agency findings must be supported by "substantial evidence" within the administrative record.

Close Calls

It's always better to err on the side of including a document in the record unless the agency counsel can articulate a specific reason for not including it.[7]

What Does Not Go Into the Record

Almost as important as what goes into the record is what should be excluded. Numerous documents will be identified that seemingly do not belong in the record, like preliminary drafts of staff reports or internal memos that relate only to procedural matters such as the scheduling of staff meetings. To be sure, local agencies should err on the side of putting documents into the record when in doubt. But there are three important kinds of documents that should nevertheless generally be excluded:

[6] *See* Cal. Civ. Proc. Code §§ 1084-1097. Special procedures for CEQA cases are contained in Public Resources Code sections 21167-21168.5. In a CEQA challenge, the distinction between legislative and adjudicative decisions is less significant because Public Resources Code sections 21168 and 21168.5 apply the substantial evidence test in both cases. In the event a legislative action is challenged in an action under 42 U.S.C. section 1983, the court may still scrutinize the agency's record.

[7] *County of Orange v. Superior Court*, 113 Cal. App. 4th 1 (2003).

- **Attorney-Client Privileged Materials.** Communications between the agency and its attorneys are generally excluded from the record. Such documents should be marked "attorney-client privilege" and filed separately.
- **Personal Notes and Reflections.** Personal notes (which may include e-mails)[8] should be excluded to the extent that they reflect personal opinions. Such notes may be removed in some instances if they have not been shared with interested parties or the decision-making body. However, circulated notes and memos belong in the record.
- **Early Staff Level Drafts.** Earlier drafts of official documents, such as environmental documents, decisions, or even the final decision itself, may also be excluded. The basis for this exclusion is the Public Records Act,[9] which recognizes the need for public officials to be free to develop new theories and ideas. If such documents were to be included in the record, staff is less likely to be creative and the public is less well served.[10]

The mere fact that a document fits one of these three classifications is not enough, in itself, to exclude the document from the record. The document must not have been circulated among those involved in the decision.

Take for example, an early draft of an environmental impact report (EIR). Sometimes, applicants prepare the earlier drafts for staff review before a final "draft EIR" is circulated. Here, the earlier drafts, and any resulting markups, should be included in the record because they represent collaboration between the agency and the applicant. However, if agency staff prepared the early draft, and it was not circulated outside of the agency, the document is more likely to be covered by the deliberative process privilege.

Create a Filing System that Separates Various Types of Documents

A well-designed filing system will make compiling the record easier. In addition to general files (such as correspondence, evidence, notices), create separate files for the types of documents likely to be excluded (attorney-client information and early drafts). Staff should still comb through the general files for notes containing personal impressions, then consult with the agency's attorney about the degree to which such items may be excluded.

Obviously, what can and cannot be excluded from the record is not an exact science. It is always wise to consult with the agency's counsel when considering what should be excluded. In addition, the administrative record should include a log or list of documents being withheld. Finally, excluded documents should be retained in the agency's files for later review and to assist in a final review of the record to ensure its completeness.

Assembling the Record

The preparation of the administrative record is typically triggered by a formal request from a person or organization considering a challenge. There is generally no formal deadline for making this request.[11] Once received, however, the agency must prepare the record and mail or deliver it within 190 days after the date of the request.[12] For CEQA matters, the record must be prepared and certified within 60 days.[13] The party challenging an agency decision is responsible for the cost

[8] Caution should be exercised as to what is put in e-mails because they can be discoverable public records. A petitioner who discovers e-mails may use them to augment the record.

[9] *Wilson v. Superior Court*, 51 Cal. App. 4th 1136 (1996).

[10] *See Times Mirror Co. v. Superior Court,* 53 Cal. 3d 1325, 1342 (1991); *Marylander v. Superior Court,* 81 Cal. App. 4th 1119 (2000).

[11] *See* Cal. Civ. Proc. Code § 1094.6. However, a request must be filed within 10 days of a filing of a CEQA action. Cal. Pub. Res. Code § 21167.6(a).

[12] Cal. Civ. Proc. Code § 1094.6(c).

[13] Cal. Pub. Res. Code § 21167.6(b).

of preparing the administrative record.[14] Many local agencies require that the challenger pay the estimated cost before preparing the record and the actual cost before the record is certified.[15]

It may become clear at a hearing that the decision likely will be the subject of a court challenge. In these cases, agency staff, working with the clerk and agency counsel, may begin preparing the record before a request is made. Indeed, this advance knowledge ensures that all the evidence necessary to support the decisions is included.

If the agency's decision to approve a development project is challenged, the agency may allow the applicant to prepare the record.[16] Similarly, petitioners in CEQA cases will often assert their right to prepare the record.[17] Local agencies, however, should be cautious about this approach. Such records may be organized in a manner calculated to influence the outcome of the case. Moreover, the applicant probably has less access to some of the materials (such as items presented at a public hearing). However, the record must still be certified by the agency, and the agency can refuse to certify an incomplete record or portions that include items not properly part of the record.

A good starting pointing for organizing the record is to convene a meeting of all staff who played a role in presenting information to the decision-maker. The focus of the meeting should be to outline the general chronology leading up to the agency decision, including the dates of each hearing or meeting before the decision-making body. This process will assist all members of the group in understanding the types of evidence that must be included in the administrative record. The agency's attorney should be involved in determining what goes into the record and how it will be organized.

Development approvals are frequently granted in the form of concurrent agency approvals of a various land use entitlements or regulations. For example, a large project may entail certification of an environmental impact report, approval of a general plan amendment, a zone change, and a tentative map approval. Even if the applicant only challenges one of the actions (for example, a condition imposed on the tentative map), it may be better to include all documents associated with each action concurrently approved because of the overlapping relevance of the evidence. In CEQA cases, all approvals must be treated as part

Case Study: The Cost of a Poorly Organized Record

A poorly organized record can increase the agency's exposure to liability. How can the court determine if a decision is reasonable or supported by substantial evidence if it cannot find the evidence on which the agency relied? The consequences can be serious. In one case, a court was presented with a record consisting of 14 volumes, most of which were "neither properly indexed nor coherently organized."[18] Many documents were unlabeled; others incomplete; and some attachments could not be differentiated from the documents themselves. The court could not locate the required findings, and as a result, reversed the judgment and ordered the trial court to direct the agency to set aside its approval of the project. The court admonished the agency:

> *When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two. In this case, the parties totally missed the appellate mark by failing to provide an adequate record for review.*

[14] Cal. Civ. Proc. Code § 1094.5(a).

[15] Gregory M. Kunert, *Initiating Proceedings to Review*, in CEB, *California Administrative Mandamus* § 10.14 (3d ed. 2004).

[16] Rochelle Browne, *The Administrative Record*, in CEB, *California Administrative Mandamus* § 4.8 (3d ed. 2004).

[17] *See* Cal. Pub. Res. Code § 21167.6(b)(2).

[18] *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 372 (2003).

of one project, and some attorneys recommended handling non-CEQA approvals the same way.

Typically, it's best if the agency attorney oversees preparation of the record with the assistance of those responsible for its various components. For example, in a challenge to a conditional use permit, the clerk would normally be responsible for collecting the public hearing notices and preparing the transcripts of the public hearing leading up to the conditional use permit decision, while the staff planner assigned to oversee the application would be responsible for collecting and organizing the staff reports, environmental documents, and all correspondence or other transmittals relating to the project.

Hearing Audiotapes and Transcripts

Public hearings are usually crucial to the agency's final decision, and it's important that they be recorded accurately. Hearings are often sufficiently recorded on video or audiotape. But for important cases where litigation is likely, it may be wise to have a court reporter present because tape recordings and videos can malfunction and are difficult to transcribe.[19] As difficult as it may be for a court reporter to attend a public hearing and transcribe the proceedings, it is considerably more difficult to transcribe from an audiotape, where staff, the legislative body, and members of the public speak without identifying themselves.

If the meeting is videotaped, a copy should be provided to the transcriber, and staff should assist by identifying the key participants. Once the draft is completed, the clerk, legal counsel and the relevant staff should review it to verify that each speaker is correctly identified in the transcript.

Organizing the Administrative Record

The administrative record should be organized in a way that helps the court, the public, or any interested person pinpoint information. Thought should be given to what works best in each particular case. Chronological organization is common and works well for the typical application process. But the nature of the challenge may suggest a different organization. For example, if the adequacy of notice of the public hearing is at issue, the logical organization may be to combine all of the public notices, mailing lists and similar documents in the first volume of the record.

The size of the record can vary from a mere handful of papers to 40 or more numbered volumes. Customarily, the record is prepared on 8½ x 11-inch paper and organized into volumes that do not exceed 300 pages. A judge is not likely to have the time to read the entire record. Thus, the record should be organized so that evidence is easily located. An easy-to-use record is also likely to assist parties in citing to the record in their written arguments.[20]

Some of the things that make the record easy for the court to review are easy to do:

- **Table of Contents.** A table of contents should designate each document by title, date and, if applicable, author, as well as page number. If there is more than one volume, the complete table of contents should precede the first volume of the record. Each subsequent volume should provide either the complete

[19] *See Watts v. Civil Service Board*, 59 Cal. App. 4th 939 (1997).

[20] Rochelle Browne, *The Administrative Record*, in CEB, *California Administrative Mandamus* § 4.9 (3d ed. 2004).

table of contents or the portion of the table of contents relating to that volume.[21]

- **Index.** Index each document to show the date, short description, volume number, and the volume page number. This master index goes with Volume 1, but it is helpful to include it in each volume.
- **Descriptive Titles.** Describe the documents in the index in a way that tells the court what they contain. For example, a title like *"Letter from Mr. Smith dated 6/30/05"* does not help if Mr. Smith wrote several letters. Instead, use more descriptive titles: *"Letter from Mr. Smith dated 6/30/05 describing concerns that draft EIR did not address impacts on local hydrology."*
- **Tabs.** Tab each item identified in the appendix in addition to consecutively numbering the pages in the record.

The record should also be marked to permit quick review. The preferred method is to chronologically paginate the administrative record using a "Bates Stamp." Litigants and the court prefer this method because it allows them to find information more easily.[22] Typically, the agency will copy all of the documents in order to maintain the integrity of the original documents.

Final Review and Certification

After the administrative record is fully assembled with the table of contents, the individual most familiar with the record should carefully review it to ensure its accuracy and completeness. Upon determining its completeness and accuracy, the clerk should prepare and execute a certification, to be placed at the front of the first volume of the record. A record that has not been certified can be objected to as hearsay.

Assembling the Administrative Record

- Put one person in charge.
- Bind and tab volumes for easy use.
- All pages (if possible) should be 8½ x 11-inches (oversize maps and other documents can be folded and inserted in sleeves or pockets).
- Separate documents with numbered tabs.
- Number sequentially through all volumes.
- Use a stamp to number pages in the lower right hand corner.
- Ensure that the record is well fastened and easy to handle.
- A complete and accurate index is essential, whether chronological, topical or by categories.
- Electronic records may be helpful in large, complex cases if the court is equipped to use them (some courts require electronic records in cases with voluminous records).

Copies of the record should be made for each of the parties to the litigation, as well as the court. Further, it is common in many jurisdictions to provide an additional, "courtesy" copy of the record—or at least the most relevant excerpts—to the court for the court's convenience.[23]

Some courts do not retain the administrative record. Those courts that retain the record may damage or lose it. Some judges and clerks write notes on the record. Thus, it is a good idea to keep an extra, clean copy. This is also useful to ensure that the court of appeal receives a copy of the record early. Trial exhibits are not generally forwarded to the court of appeal until shortly before the hearing. The appellate court will need the record to write its bench opinion.

[21] Joel D. Kuperberg, *The Administrative Record*, League of California Cities 2003 Annual Conference, Joint City Attorneys/City Clerks Session (2003).

[22] *Id.* In one case, a petitioner submitted his own uncertified record, which contained numerous errors. In response, the local agency prepared, certified and filed its own record. The agency persuaded the judge to use its record, which had some significant differences from the petitioner's record.

[23] *Id.*

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CHAPTER 5

Writing the Staff Report

IN THIS CHAPTER

Balancing Detail and Brevity

Organization

The staff report sets the stage for good decision-making by presenting key information in a way that makes it easy to grasp the critical issues. Staff reports are also important because they are one of the places within the administrative record where the agency's underlying concerns and rationale may be cogently explained.[1]

Staff reports are usually produced for both legislative and quasi-judicial decisions. Reports for legislative decisions usually highlight the key policy considerations. Reports for quasi-judicial decisions typically include more technical information about how particular policies and ordinances should be applied to the application at issue.

A well-written report can validate an agency decision, even when it does not reflect staff's recommended course of action. In contrast, an incomplete or contradictory report can pave the way for a lawsuit against the agency.

[1] *See Browning-Ferris Industries v. City Council*, 181 Cal. App. 3d 852 (1986) (the opinions of staff constitute substantial evidence upon which the agency may rely).

Balancing Detail and Brevity

Officials have little time to read lengthy reports. Brevity is therefore appreciated. The challenge for the drafter is to balance this with the need to provide sufficient information. Here, there is probably no substitute for experience. Staff reports need not address every potential inquiry—yet they need to provide enough information for the decision-maker to make a well-informed decision.

Striking this balance requires the drafter to make decisions about what information to emphasize. There are a number of format techniques that can help:

- **Standard Headers.** Standard subheaders, like "*Fiscal Impact*," "*Plan Consistency*" or "*Recommendation*," provide structure and help the drafter focus on the key issues. New subheads, such as "*Public Involvement*" or "*Housing Impact*" can be added to emphasize subjects in which the decision-maker has expressed a specific interest.
- **Short Sentences.** Use short sentences. Clear language helps decision-makers refer to the report during the "heat" of a discussion.
- **Matrices.** Matrices provide a quick way for readers to gauge the important information associated with the proposal.[2]
- **Bulleted or Numbered Lists.** Bulleted lists (like this one) help the reader sort through information. They also free the drafter from developing wordy transition sentences between ideas.

Finally, attempting to achieve the right balance between critical information and brevity in the staff report is seldom a one-person job. Peers and supervisors should review the report to assure that key information is not omitted and to edit out unnecessary detail.

Organization

How the report is organized will influence how the issues are presented and analyzed. There is no "right" organization—actual styles vary. For example, the chronology below places the recommendation section before the analysis section. But many agencies reverse this order. Regardless, keeping format, font, and language consistent makes it easier to locate specific information.[3] This section summarizes many of the "typical" sections found in staff reports.

Staff Reports: Special Considerations For Land Use Decisions

- **Consistency with General Plan.** The report should note the extent to which the proposed action is consistent with the various elements of the general plan.
- **Impacts on Housing Policies.** Changes in housing policy may affect the agency's ability to achieve its regional fair share allocation number, which in some cases may affect the agency's eligibility for certain funding sources.
- **Permit Streamlining Act.** Applications for entitlements are governed by timelines imposed by the Permit Streamlining Act. The report should note when the application was filed and the time remaining before the application is deemed approved.
- **Environmental Review.** The environmental review and potential mitigation measures are often key elements of a decision. Addressing or summarizing these issues in a separate section of the report helps decision-makers sort through details.
- **Multiple Approvals.** Always identify any additional actions or approvals that must be obtained from the agency or other agencies before the project can proceed.

Title, Summary, and Cover Sheets

The title should be descriptive enough to inform the decision-maker of the issue presented (for example: *Review of Tentative Map Application on 120-acre Parcel Located at 300 Westgate Road)*. Many agencies also include a short two- to three-sentence summary to frame the issues for consideration.

[2] Stuart Meck & Marya Morris, *Formatting and Writing the Staff Report, Zoning Practice* (November 2004).

[3] Arnold Alvarez-Glasman & Roger A. Colvin, *Legal Writing 101: Effective City Council Report Writing* (May 1999).

Background Summary

The background section summarizes important facts or events leading up to the point of decision. This is a good place to summarize the process and the staff role in developing the recommendations. For example, if the report involves a recommended ordinance that was developed with significant public participation or stakeholder involvement, this would be an appropriate place to note that involvement. Likewise, if the report involves a typical application, the background section can summarize the meetings that staff has had with the applicant.

Recommendation

The recommendation is a concise statement of whether or not the decision-making body should approve the item under consideration. Recommendations should be limited to a single "motion ready" sentence (see sidebar "Recommendation Tips") that completely explains the recommended action.[4] For example:

- **Not "Motion Ready":** *Introduce ordinance approving a negative declaration on environmental impact and amending the zoning ordinance.*
- **"Motion Ready":** *Approve the negative declaration on environmental impact and amend Section 5-12-120 of the Zoning Code to allow a post office and public and private postal services in the C-N Zone, subject to an administrative use permit.*

Here, the second recommendation is "motion ready" because a decision-maker need only say, "*I move to*" before restating the recommendation verbatim.

Sometimes the recommendation will include conditions or alternatives. For example, if a request for rezoning conflicts with the general plan, staff might recommend an alternative that would not be in conflict. If there are multiple recommendations, each should be listed and numbered separately. If the staff report carries no specific recommendation, this section should state "*Staff has no recommendation on this matter*" or "*For information only*."

Proposed Findings

Draft a proposed set of findings based on staff's recommendation. For more information on drafting findings, see Chapter 8.

Discussion of Proposed Action

The discussion section builds the case supporting the recommendations. Findings of fact, analysis, and commentary should each be presented in separate subsections. Avoid mixing factual information with subjective conclusions. Be cautious about using absolute language like "never" or "always," or "only"—which might be used against the agency if the decision-maker elects to take a different action than what is included in the staff recommendation.

Discussion elements will vary depending on the type of decision (including whether it's legislative or quasi-judicial). But typical elements include:[5]

- **Site Information Data.** Basic information includes information about the site, current zoning and surrounding land uses. Additional information would include recent land use

Recommendation Tips[6]

- Do not refer to attachments in the recommendations (for example "That the City Council approve the attached agreement…"). Framing a recommendation in this way frustrates members of the public who receive agenda summaries without attachments.
- If the staff recommendation differs from that of an advisory body, such as the design review board, clearly state the difference in the recommendations. List both recommendations, with the advisory body recommendation first.
- Advisory body recommendations should be accompanied by attached minutes that reflect the recommendation.

[4] City of San Luis Obispo, *Manual for Preparing Council Agenda Reports* (March 2003).

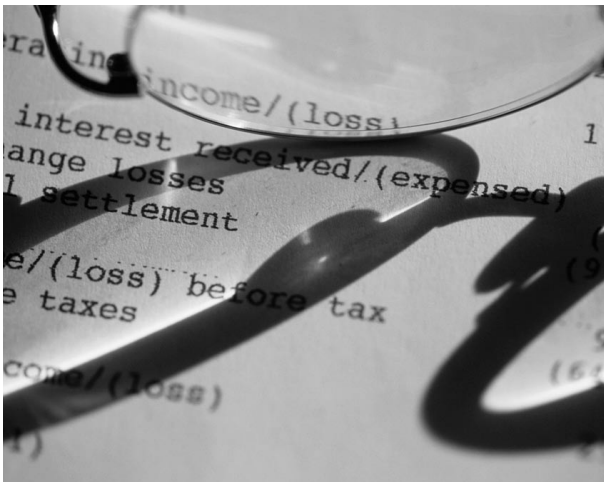
[5] Stuart Meck & Marya Morris, *Formatting and Writing the Staff Report, Zoning Practice* (November 2004).

[6] City of San Luis Obispo, *supra* note 4.

actions (such as rezoning, conditional uses) in the area and a summary of existing and proposed public facilities serving the site, including sizes of water and sewer lines, and classification and condition of roads. Finally, any other relevant information, such as transit issues, traffic counts, environmental data, cultural site issues or general safety issues should also be included.

- **Legal Issues.** In some instances, it may be necessary to explain the effect that a state or federal law or regulation has on the decision. This section should be reviewed, if not written, by the agency attorney. Often an opinion from the attorney will be included as an attachment.
- **Staff Analysis.** This section should present the decision-making criteria from plans or development codes with comment on how the project meets or does not meet these criteria. The analysis should also evaluate the consistency of the proposed action with all applicable plans and include excerpts from relevant written policies, ordinances, and map designations. If necessary, this section should also include any specialized impact analysis.
- **Pending Data and Information.** Summarize additional data or information that has not yet been submitted.
- **Other Agency or Department Comments.** Include comments from other affected agency departments, commissions, committees, advisory bodies, or outside organizations. It is not usually necessary, however, to cite the concurrence of the agency chief executive or attorney unless there are specific legal issues involved. In citing concurrences of department heads, titles should be used, not proper names.[7]

Finally, if staff recommends conditional approval, the report should provide clear guidance on what conditions must be met, and by what date.



Description of Fiscal Impact

The fiscal impact section identifies how much the proposal will cost the agency and how such costs will be financed. A chart or table often communicates fiscal information better than a narrative description. But narrative descriptions are still used to draw a conclusion about financial data.[8] Key issues to address in the fiscal section include the following:

- **Total Cost.** How much will the recommended action cost? Is this a one-time or recurring cost? Explain the basis for the cost estimate, referencing the source document, such as a budget or financial plan.
- **Sources.** Identify the sources of funding or revenue. Will it come from grants? The general fund? Fees? Will debt financing be required? Is it necessary to transfer funds from somewhere else?
- **Comparison.** Cost estimates alone often fail to provide sufficient perspective. Explain how the estimates compare with previous estimates on the projects or similar costs on other projects.
- **Impact.** Are existing resources adequate? If not, how will the extra cost be funded? Are there any revenue or cost offsets? If a new appropriation is required, can the agency

[7] *Id.*

[8] *Id.*

afford it? What is the impact on ending fund balance and working capital?

The fiscal impact could include either savings or costs, on either an ongoing or one-time basis. When recommended actions are neutral relative to cost, this should be stated in the fiscal impact section. This section may be omitted when it is clearly inappropriate.

Discussion of Alternatives

This section should present reasonable alternatives to the staff recommendations, including taking no action (if this would be reasonable). A brief discussion of the advantages and disadvantages of each alternative should be included, with an explanation of why the alternative is not recommended.

For most projects and proposals that require an environmental impact report under the California Environmental Quality Act, the discussion of alternatives should be consistent with (and perhaps summarize) the discussion of alternatives in the environmental impact report. In most cases, it's good to limit the alternatives to those included in the environmental review. If different or additional alternatives are listed, explain why these alternatives were not reviewed as part of the environmental review process.

The recommended action(s) should not be restated, since this section is intended to outline alternatives to the recommended action. If no realistic alternatives can be identified, this section should be omitted.

Attachments

Attachments supplement information in the report. Examples include consultant reports, minutes, maps, site plans, or contract provisions. All attachments should be referenced within the staff report. Some thought should be put into what documents are attached to strike the right balance between brevity and providing sufficient documentation. The attachments should be well organized, numbered, and similarly labeled. Thus, when a reference is made to an attachment within the report it can be referred to by both its title and label. For example:

Finding the Right Term[9]

Choosing the right transition or action word may assist the drafter focus on the elements and incorporate clear language.

Demonstrating Cause and Effect: "because, since, accordingly, thus, therefore as, for this reason, therefore, as a result, consequently, it follows that."

Providing an Example: "for instance, for example, as one example, to cite but one example, one case of this nature, likewise, another."

Showing Deliberation: "granted, to be sure, admittedly, though, even though, even if, only if, true, it is true that, while, naturally, in some cases, occasionally, provided, when, if, while it may be argued that, notwithstanding, despite."

Interpreting Jargon: "that is, in other words, put simply, more commonly."

Sequencing Ideas: "First . . ., Second . . ., Third . . . ," State initial point, then: In addition. . . , . . .also . . . , Finally, . . ."

Adding a Point: "moreover, further, furthermore, also, and, in addition, besides, what is more, similarly, nor, along with, likewise."

Restating: "in other words, that is, this means, in simpler terms, in short, put differently, again, put simply."

Contrasting: "but, instead, yet, however, on the one hand, on the other hand, still, nevertheless, conversely, on the contrary, whereas, nonetheless, in contrast."

Pressing a Point: "in fact, as a matter of fact, indeed, of course, without exception, still, even so, anyway, that fact remains."

Summarizing: "to summarize, to sum up, to conclude, in short, in brief, so, and so, consequently, therefore."

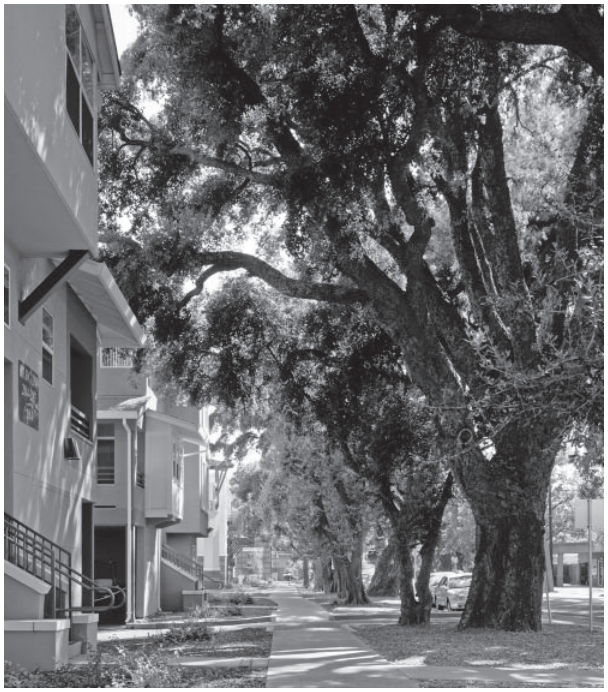
[9] Adapted from Bryan A. Garner, *Advanced Legal Writing and Editing* 50 (LawProse Seminar Materials, 1997).

> The Planning Commission recommended that the plan amendment be approved. (Attachment 2, *Minutes of June 12 Planning Commission Meeting)*

All attachments should be listed at the end of the staff report, complete with title and label number, and should be labeled consistently so that users can routinely find the information they need.

Signature

The staff report should include a signature approval line for the senior staff person responsible for the report. The signatory is often the community development director—particularly when the report is submitted to the planning commission. Other agencies, however, require or the agency's chief executive or manager to sign the report, but also include the name of the appropriate department head.



Drafter's Checklist

Introductory Headings

- ✓ From: (name, title of department head)
- ✓ Prepared by: (name, title of report writer)

Staff Recommendation

- ✓ Prepared in "motion ready" manner
- ✓ Stated in one sentence
- ✓ Stated specifically and completely

Draft Findings

- ✓ Develop draft findings based on staff recommendation

Discussion

- ✓ Write for public and professional reader
- ✓ Describe background (any past actions)
- ✓ Provide clear, complete explanations
- ✓ Avoid acronyms and technical jargon
- ✓ Avoid absolute terminology, such as "never," "always" or "only"
- ✓ Reference attachments in right places
- ✓ Include comments from other agencies, advisory bodies, community groups

Fiscal Impact

Provide specific and complete information regarding:

- ✓ Total cost of program
- ✓ Funding source(s)
- ✓ If new or higher appropriation required, how much and why?
- ✓ If transfer required, how much remains in original account?

Alternatives

- ✓ Offer alternative recommendations (only if they are real and reasonable)

Attachments

- ✓ Organize the attachments
- ✓ Create one page summary or table of attachments
- ✓ Assure that all attachments are specifically mentioned in the report

Proofing

- ✓ Has more than one person checked the report in detail?

CHAPTER 6

Processing Applications

IN THIS CHAPTER

The Permit Streamlining Act

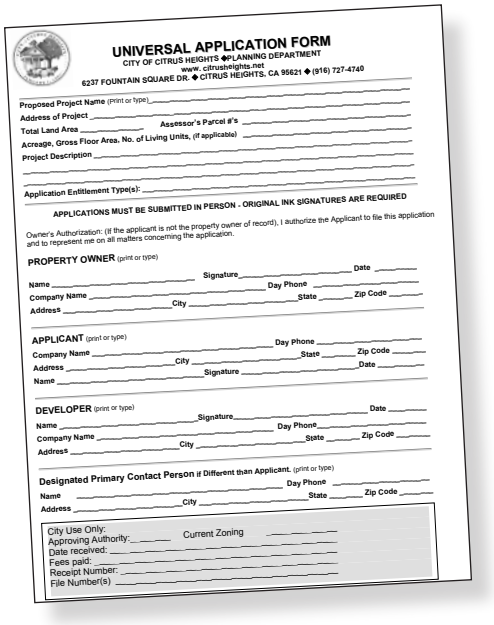
Benefits (and Risks) of Initial Concept Meetings

Design Review and Other Concurrent Processes

Environmental Considerations

Conditions of Approval

Other User Friendly Policies



UNIVERSAL APPLICATION FORM
CITY OF CITRUS HEIGHTS ◆ PLANNING DEPARTMENT
www. citrusheights.net
6237 FOUNTAIN SQUARE DR. ◆ CITRUS HEIGHTS, CA 95621 ◆ (916) 727-4740

Proposed Project Name (print or type)
Address of Project
Total Land Area — Assessor's Parcel #'s
Acreage, Gross Floor Area, No. of Living Units, (if applicable)
Project Description
Application Entitlement Type(s):

APPLICATIONS MUST BE SUBMITTED IN PERSON - ORIGINAL INK SIGNATURES ARE REQUIRED

Owner's Authorization: (If the applicant is not the property owner of record), I authorize the Applicant to file this application and to represent me on all matters concerning the application.

PROPERTY OWNER (print or type)
Name — Signature — Date
Company Name — Day Phone
Address — City — State — Zip Code

APPLICANT (print or type)
Company Name — Day Phone
Address — City — State — Zip Code
Name — Signature — Date

DEVELOPER (print or type)
Name — Signature — Date
Company Name — Day Phone
Address — City — State — Zip Code

Designated Primary Contact Person if Different than Applicant, (print or type)
Name — Day Phone
Address — City — State — Zip Code

City Use Only:
Approving Authority: — Current Zoning
Date received:
Fees paid:
Receipt Number:
File Number(s)

Fairness and open communication are key ingredients for an effective permit processing system for quasi-judicial decisions. However, the evaluation process should also be designed in a way that provides the agency the opportunity to fully review the substance of the application in light of overarching general plan objectives.

Good evaluation procedures also reduce litigation and foster community confidence by assuring consistency and predictability. A large part of avoiding litigation is managing applicants' expectations. If applicants know what to expect and agencies follow through on their commitments, the potential for conflict is greatly reduced.

The Permit Streamlining Act

The Permit Streamlining Act requires local agencies to make decisions on "development projects,"—or most quasi-judicial land use decisions—within specified time limits. Legislative decisions, like general plan amendments, zoning ordinances, and development agreements, are not subject to the Act. Failure to act within applicable time limits could result in the project

being "deemed approved," which is effectively an automatic approval of the project.[1]

The Act imposes several standards for decision-making:

- **Detailed List of Submittal Requirements.** Local agencies must maintain a detailed list of application requirements, which cannot be changed after an application is submitted.[2] The list must indicate the criteria that will be applied in determining whether an application is complete and the time limits for review and approval of applications.[3] These lists should be readily available in the planning office (or website). After the application is accepted, the agency cannot require the applicant to provide new information, but may ask the applicant to clarify or supplement the information provided in the application.[4]
- **Time Limit to Accept Application.** Staff must determine whether the application is complete (meaning it includes all the information required on the list) within 30 days. If a decision is not made within this time, the application will be "deemed complete" and the agency must approve or deny the project on the basis of submitted information alone. If the application is not complete, the agency must detail its deficiencies.[5] Applicants may appeal an incomplete determination to the planning commission, governing body, or both, and the agency must issue a final decision on the appeal within 60 days.[6]

Application Checklist

- ❑ **Signatures.** If different, both the applicant and the owner should sign the application. If an agent is signing on behalf of another, proof of authority should also be submitted.
- ❑ **Contact Information**. The contact information, including phone and e-mail, of the applicant or person who is accountable for the project.
- ❑ **Property Description**. A description of the property, its address, and parcel number.
- ❑ **Description of Activities**. A detailed description of the proposed uses of the project.
- ❑ **Policy and Regulations**. A description of the planning policies and regulatory provisions that the applicant is relying on.
- ❑ **Vicinity Map**. Show the general location of the project in relation to the neighborhood.
- ❑ **Existing Facilities Map.** Designate all existing buildings, roads, walls, landscaping, signs, utilities, and easements on the property.
- ❑ **Grading Plan** Show the proposed topography at appropriate contour intervals.
- ❑ **Site Plan**. A bird's eye view of the proposed project. The plan is drawn to scale and should be large enough for items to be discernable.
- ❑ **Architectural Elevations.** Drawings of all sides of all proposed structures on the site. Elevations should be shown unobstructed by proposed landscaping materials to see how they will look as constructed. (For complex projects, cross-sections of the site or buildings or renderings may also be required).
- ❑ **Environmental Questionnaire**. The environmental questionnaire provides site-specific information.
- ❑ **Proof of Adequate Financing.** For large-scale projects that require infrastructure, the local agency may want assurance of financial commitments to ensure that all conditions are met.
- ❑ **Calculation and Payment of Fees.** Make this a prerequisite for deeming the application complete.
- ❑ **Other Information**. The project may trigger a need for additional information, like a traffic report, biological study (endangered species), water availability report, phasing plan, landscape plan, lighting plan, or sign plan.

[1] Cal. Gov't Code § 65943. *See* James Longtin, *Longtin's California Land Use* § 11.24 (2d ed. 1987 & Supp.).

[2] Cal. Gov't Code § 65940.

[3] Daniel J. Curtin, Jr., & Cecily T. Talbert, *Curtin's California Land Use and Planning Law* (Solano Press, 2004 ed.).

[4] Cal. Gov't Code § 65944.

[5] Cal. Gov't Code § 65943.

[6] *Id.*

- **Initial Study: Level of Environmental Review.** Once the application is determined to be complete, the agency has an additional 30 days to determine what level of environmental review is required under the California Environmental Quality Act (CEQA). The agency may determine that the project is exempt, requires a negative declaration, or requires a full environmental impact report (EIR).[7]
- **CEQA Timelines.** CEQA has its own timelines for making environmental determinations. For example, local agencies have a year to complete and certify an EIR.[8] Unlike the Permit Streamlining Act, however, these CEQA timelines are "directory," not "mandatory," meaning that a project is not "deemed approved" if the CEQA timeline is not met. Instead, the applicant's remedy is to sue to enforce the CEQA time limits.[9]
- **After Environmental Review: Time Limits for Final Decision.** After the environmental review is complete, the requirements of the Permit Streamlining Act again control. The agency must make a final decision within a specified time, depending on the level of environmental review. Action must be taken within 180 days from the certification of an environmental impact report (or 90 days for certain affordable housing projects) or 60 days from the adoption of a negative declaration or determination that the project is exempt.[10] Failure to act within these time periods means that the application will be "deemed approved."
- **Consolidating Decision-Making.** In many cases, local agencies bring the project approval to the decision-maker at the same time that environmental review is certified, therefore allowing the decision-maker to make a decision about the entire project. When this happens, there is generally no problem in complying with the requirements of the Permit Streamlining Act.
- **Failure to Act Within Time Limits.** Failure to act within the Permit Streamlining Act's time limits means that the application will be "deemed approved." Automatic approval hinges, however, on compliance with the notice and hearing requirements associated with the proposed action.[11] If the agency fails to provide notice, the applicant may either directly provide public notice or sue to compel the agency to act.
- **Disapprovals.** If the application is disapproved, the agency must specify reasons for disapproval. An agency may not disapprove an application solely to comply with the time limits.[12]

What Happens When the Applicant Amends the Application

In some cases, the applicant will try to amend the project after it's submitted. Thus, the agency's application requirements should specify that once an application is accepted as complete, changes that will increase the number of units, add uses that were not previously listed, substantially change the site plan, or make other changes that trigger the need for additional discretionary approvals (e.g. landmarks review) will require submission of a new application and restarting the review "clock."

[7] 14 Cal. Code Regs. § 15050.

[8] Cal. Pub. Res. Code § 21151.5.

[9] *See Meridian Ocean Sys. v. State Lands Comm'n*, 222 Cal. App. 3d 153 (1990); *Sunset Drive Corp. v. City of Redlands*, 73 Cal. App. 4th 215 (1999).

[10] Cal. Gov't Code § 65950(a); *Eller Media v. City of Los Angeles*, 87 Cal. App. 4th 1217 (2001).

[11] Cal. Gov't Code § 65956.

[12] Cal. Gov't Code § 65952.2.

- **Extensions.** The Act allows that time limits may be extended once, by mutual agreement, for no more than 90 days.[13] In addition, if there has been an extension under CEQA to complete and certify the EIR, the final decision on the project must be reached within 90 days of the certification.[14]

Agencies should periodically review application requirements to ensure that they reflect current demographic needs and development practices. Redundant, ineffective or outdated requirements should be eliminated. Agencies should also ensure that all approval requirements are put in writing.

Benefits (and Risks) of Initial Concept Meetings

The requirements of the Permit Streamlining Act can sometimes discourage the kind of dialogue between the agency and applicant that keeps disagreements out of court. As a result, many agencies offer applicants the option to participate in informal pre-application meetings. Early consultation can reduce frustration and delay by helping applicants submit a complete application on the first try.

These meetings also help applicants understand what decision-makers will accept and thus minimize the risk of denial. Typically, discussions center on the nature and scope of the project, the steps required in the process, an approximate time frame in which the project can be completed, and an approximation of the fees that will be charged. Typically this process is voluntary, though some agencies encourage pre-application meetings for complex projects, like a shopping center. In no case, however, should a formal approval of sketch plans—even by staff—be required. Local agencies should bear in mind that mandatory pre-application review might be considered part of the development approval process.

Pre-application meetings also have risks. A warm reception may give the applicant a false sense of security—particularly if a decision-maker (as opposed to staff) was present. Disappointment will follow if agency decision-makers reject the proposal, leaving the agency

Tips for A Successful Application

- ✓ Take advantage of the optional pre-application meeting.
- ✓ Read all application requirements carefully; be sure your submittals are correct and complete.
- ✓ Make sure you submit proof of water and sewer availability ("will serve" letters).
- ✓ Read the applicable policies and zoning requirements for your project. Be sure your project description conforms to these legal standards.
- ✓ Read the County's *Standard Conditions and Mitigation Measures*, and ensure your project description includes any applicable mitigation measures.
- ✓ Write a *detailed* project description.
- ✓ Quickly respond to your planner's requests for information; ask for clarification if you do not understand a request.
- ✓ Review the draft environmental document for your project *carefully*, and discuss any concerns with your planner or the planner's supervisor.
- ✓ Review Conditions of Approval from all departments *carefully*. You will be required to strictly adhere to these conditions. If you do not think you will be able to comply, or if there is anything you do not understand, ask your planner.
- ✓ Once your project is approved, comply fully with all conditions, plans, and codes.

Tip sheets can help applicants avoid common pitfalls of local requirements. Adapted from the applicant tip sheet *"What You Can Do to Save Time and Money"* prepared by the Santa Barbara County Community Planning Department.

[13] Cal. Gov't Code § 65957.

[14] Cal. Gov't Code § 65950.1.

Practice Tip

Codifying provisions for pre-application review is a good way to clarify the voluntary and non-binding nature of this process. The code should make clear that the process is voluntary on the part of the applicants and that accepting an application for preliminary review does not mean that the application is deemed complete for other permits and entitlements.

open to the argument that reliance on staff's assurances cost the applicant time and money.

Thus, it is important to emphasize the nonbinding nature of the preliminary session. The applicant should be advised that the expressions of decision-makers are opinions, and that they may change their mind upon reviewing the complete application. One practice is to have the applicant sign a form acknowledging that comments are for guidance only and that the final decision rests with the planning commission and city council or board of supervisors. The signed form may be useful later if the applicant claims reliance on the outcome of a preliminary review.

Also, agencies should have procedures for preserving information and incorporating it into the record. Given that the project is not submitted in final form, and that the process is entirely voluntary, there is some argument that the information gathered during such procedures should be omitted from the record. The more cautious approach is to assume that a court would review all information as part of the record.

Design Review and Other Concurrent Processes

The most basic application review process involves one public hearing before a zoning administrator or a planning commission. Several local agencies, however, employ more expanded processes that involve design review board, historic preservation committee, or other board.

The problem posed by multiple processes is that they should be designed so the agency can be assured of reaching a final decision within the time limits of the Permit Streamlining Act. Issues arise when different boards are empowered to deny a project for not meeting a set of standards. If a project denial is appealed, the agency must hear the appeal. If the decision is overturned, there may be little or no time to continue processing the application within the Act's time limits.

The alternative is to design concurrent sessions where multiple reviews occur. (See, for example, Land Use Application Review Process, page 43.) Under this method, advisory boards are only empowered to make recommendations to the main decision-maker (usually the planning commission). Under this method, the recommendation would not be subject to appeal where the agency specified in its procedures that only specific actions or decisions may be appealed (see Chapter 9).

Of course, more time may be available to the extent that the project requires full environmental review (and thus an EIR). Under these circumstances, additional procedures like design review may occur concurrently. Indeed, in one case, a court found that the design review process adequately mitigated the aesthetic impacts of a project so that the project did not require an environmental impact report.[15]

Avoid Making Promises

No one involved in the application review process should make representations or promises about what they think the agency's decision will be in regard to a particular land use matter. Avoid comments that suggest that a particular decision is likely.

[15] *Bowman v. City of Berkeley*, 122 Cal. App. 4th 572 (2004).

Environmental Considerations

Lawsuits filed under CEQA are perhaps the most frequent challenge to land use decision-making. The best risk management strategy the agency can employ to avoid such litigation is to train staff and, when necessary, hire knowledgeable consultants to help assure that the agency complies with CEQA.

A full analysis of all the risks associated with CEQA and land use decision-making is beyond the scope of this publication. However, here are some general practices to follow to help avoid the most common CEQA pitfalls:

- **Mitigated Negative Declarations.** Although the initial study may identify significant adverse effects, a full EIR can be avoided if the applicant agrees to reduce or eliminate the adverse effects. However, if there is a "fair argument" that the project, even as modified, may have a significant effect on the environment, the lead agency must prepare an EIR. If there is doubt, the safest route is to require an EIR.
- **Project Objectives.** The objectives statement should be consistent with other statements in the EIR regarding goals of the project. A well-written statement will help develop a reasonable range of alternatives[16] to evaluate in the EIR and will assist in the preparation of findings. Without a well-articulated project statement, the remainder of the analysis may lack direction and make it hard to defend an agency's rejection of certain alternatives.
- **Alternatives.** Alternatives should be drafted that avoid one or more specific impacts.[17] Many EIRs contain standard alternatives, such as "no alternative" (required) or "reduced density." However, the alternatives section should explain why each alternative was selected, how it avoids certain impacts, and why it was rejected.
- **Complete CEQA Findings.** Findings should explain how the agency has resolved each issue raised during the proceedings, explain what impacts are significant, what mitigation measures are feasible, why other alternatives were rejected, and why the project's benefits outweigh its consequences (see Chapter 8).
- **Environmental Determination Appeals.** Any decision by staff, a planning commission, or any other non-elected body that a project is not subject to environmental review, or to certify an EIR or approve a negative declaration, is subject to appeal to the city council or board of supervisors. State law doesn't specify a deadline for considering such appeals and doesn't indicate whether the legislative body needs to resolve the appeal in a proceeding that is separate from the any appeal on the project itself. The local ordinance should specify how the jurisdiction handles such appeals.

Finally, when the likelihood of litigation is high, and the agency (or the applicant) intends to retain outside counsel, the better approach is to bring counsel into the process before any claim is filed. Litigation counsel can help spot weaknesses and strengthen the EIR to assure that it can withstand judicial review. Given that litigation counsel will have to review the report and the record anyway, having them participate earlier in the process may not cost that much more and may make the actual cost of litigating the case much less.

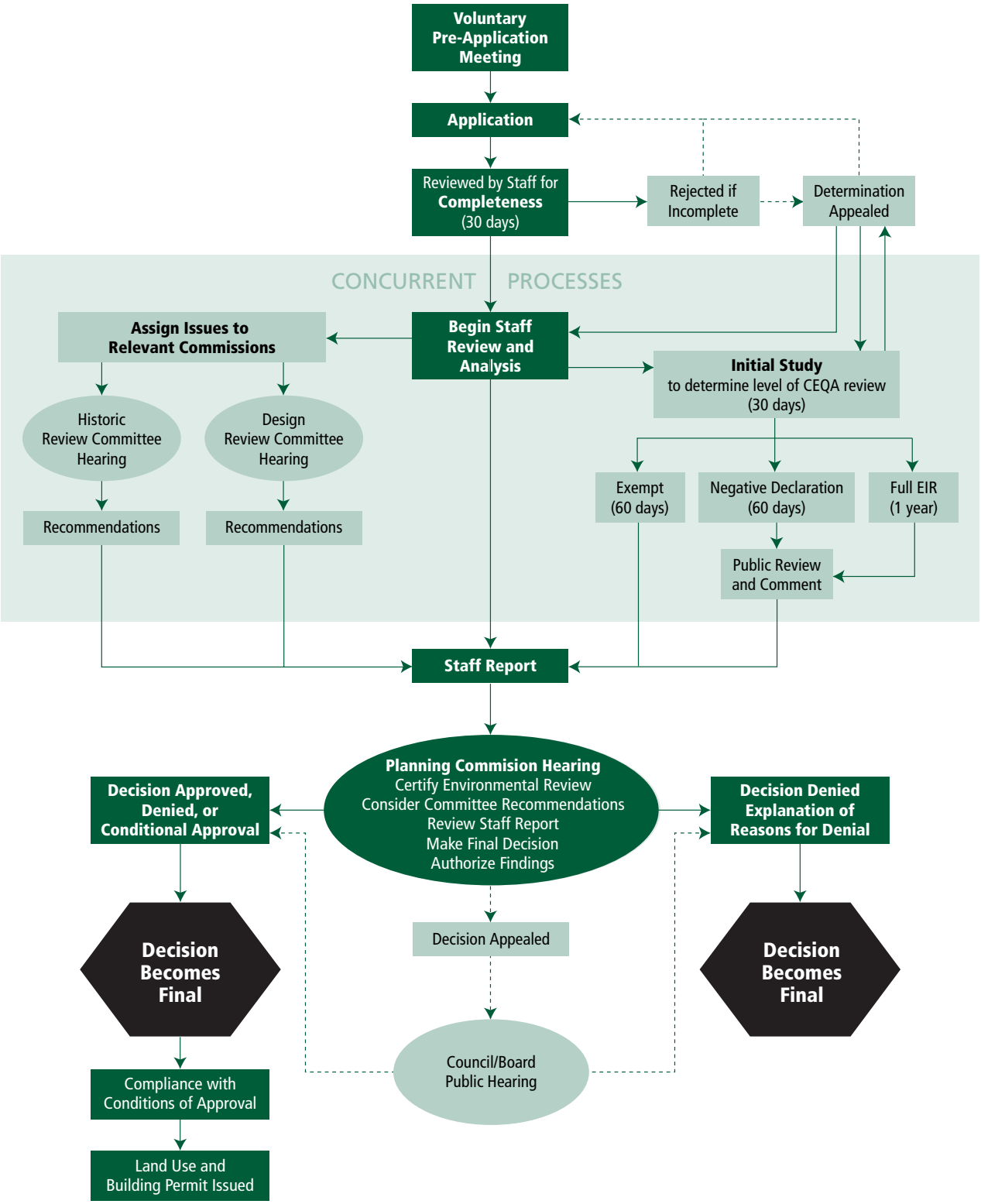
Practice Tip:

After completing an initial study, the local agency should notify the applicant in writing of any changes to the project that the agency proposes to mitigate potentially significant environmental impacts. The letter should specify a deadline for the applicant to accept the proposed measures. If the applicant and the agency cannot reach agreement on mitigation measures, the agency must either prepare an EIR or deny the project.

[16] 14 Cal. Code Regs. § 15124.

[17] 14 Cal. Code Regs. § 15126.6.

Sample Land Use Application Review Process



CEQA Training

The appropriate use of CEQA is one of the most frequently litigated issues in California. Staff and decision-makers should be encouraged to attend training seminars. Many consultants offer one-day trainings, and others are offered through universities, such as the UCLA or UC Davis Extension or other professional and continuing education programs. Other organizations, such as the League of California Cities, California Chapter of the American Planning Association, and the Urban Land Institute offer special trainings or incorporate sessions into annual meetings and conferences.

Conditions of Approval

Most local agencies have a set of standard conditions that are imposed on most, if not all, projects. Many agencies have several sets of standard conditions that apply to different types of projects. These conditions assure that the project will meet a set of criteria for fees, public improvements, lot designations, mitigation measures, and similar requirements. They also may address the nature of the relationship between the agency and the applicant. For example, it's common for agencies to require the applicant to post financial securities (see sidebar "Using Financial Securities to Assure Compliance") or indemnify and defend the local agency should litigation arise.[18]

A good practice is to periodically review and update any standard conditions to make sure they reflect current agency policies. To maximize the likelihood that such conditions can do the job that they were intended to do, all conditions should be specific and clearly worded. If the conditions are extensive, it also can be helpful to group related conditions under sub-headings to make the document easier to understand.

Many projects also include special conditions of approval, which address the same general issues as the standard conditions but are drafted to meet unique circumstances associated with the project. Special conditions raise at least two issues that staff should be aware of. First, staff should compare the special conditions with the standard conditions of approval to assure that they do not conflict (it can become routine to attach the standard conditions to the application without detailed review). To the extent that they do conflict, one or both of the conflicting provisions should be amended.

Second, staff should assure that any project specific, conditional approval is logically related and proportional to the impact of the development. The Takings Clauses of the United States and California Constitutions require dedications of property (and imposition of fees) that are imposed individually (as opposed to by a broader legislative act) to meet this standard.

Other User Friendly Policies

Many scenarios leading to litigation can be avoided by adopting internal procedures that promote effective communication with applicants. This is especially important when permit processing requires review by multiple departments or agencies. Consolidation of internal procedures simplifies the permit issuance process and increases accessibility.[19] Promoting consistency can avoid inferences of favoritism or political influence over development decisions, another potential source of litigation.[20] Here are some common techniques and methods:

- **General Information.** Publications, brochures and guidelines could be available to explain the review process, and changes in fee structures, engineering requirements, zoning changes and other information could be posted.
- **One-Stop Permitting.** Local agencies may benefit from creating a central point for issuing permits and collecting fees. Large

[18] *See* 85 Cal. Op. Att'y Gen. 21 (2002) (opining that a county may require an applicant for a coastal development permit to agree to defend, indemnify, and hold harmless the county in any action brought by a third party to void the permit).

[19] California Office of Permit Assistance, *Local Government Permit Streamlining Strategies* (January 1994).

[20] *See Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003).

Using Financial Securities to Assure Compliance

MECHANISM	DESCRIPTION	ADVANTAGES	DISADVANTAGES
Proof of Financing	Applicant submits proof of financing or financing plan as part of application	• Applicant more likely to present feasible project from the start • Easy to implement • Spots trouble projects early	• Some may not be able to access adequate credit until entitlements issue
Concurrency	Agency leverages its issuance of final permit or certificate of occupancy upon compliance with permit conditions	• Applicant has incentive to complete project • No cost to agency • May be phased as development is phased	• Small administrative and tracking cost
Performance Bonds	General security payable to agency if performance measures are not met	• Generally known and accepted in industry • Assures means to complete project	• Bond companies can be slow to pay • Agency must still complete improvements
Letter of Credit	Agency gains access to applicant's credit if specific conditions are not met	• Agency usually has quicker access than bonds • Assures means to complete project	• Agency must establish that conditions are present to access funds • Agency must still complete improvements
Joint Bank Account	Agency is named on joint account and may access account as needed. Can be designed so that only agency has access	• Agency has quick access to cash and may access cash on its own determination • Assures means to complete project	• Agency has to monitor to assure sufficient balance is maintained • Often difficult for applicant to front cash • Agency must still complete requirements

Many local agencies require one or more of these affirmative guarantees on the applicant's financial obligation to construct infrastructure or otherwise comply with the conditions imposed on the project.

jurisdictions can establish multiple offices at convenient locations. All permits could be initiated from these permit centers; allowing direct access to staff and eliminating needless backtracking to various offices.[21] Ideally, a standardized application form for all permits would also be available.

- **Expedited Permit Issuance.** A single point of contact and appointed review coordinator can help coordinate reviews by multiple departments or agencies and work out discrepancies in the comments received from those agencies. To be successful, the coordinator must have the authority to make decisions when discrepancies arise.

- **Regular Meetings of Staff Review Team.** To help assure greater consistency between departments and across projects, some localities have established a staff development review team made up of planners, traffic engineers, public safety and public works officials. This team meets regularly (perhaps every two weeks or once a month) to review development proposals. These are usually limited to staff only in order to allow for candid discussions.

[21] California Office of Permit Assistance, *Local Government Permit Streamlining Strategies* (January 1994).

- **Fast Tracking.** Small and noncontroversial projects or particularly desirable projects (such as affordable housing) can be "fast-tracked" as administrative approvals by granting the planning director authority to review and approve them.
- **Permit Tracking.** Computer tracking systems are one of the most efficient means of improving organization, accountability and communication. Tracking systems have the potential to give staff members working in separate permitting departments access to the same information, facilitating concurrent processing.
- **Limit Continuances.** Another approach to expedite permit review is to limit hearing continuances granted to applicants who are not forthcoming with clearly requested information necessary to move the process forward.[22] One idea is to adopt a "three-strikes-and-you're-out" policy to encourage applicants to provide requested and complete project information necessary to expedite review.
- **Timely Infrastructure Inspections.** Agencies should clearly specify the terms and conditions for accepting the improvements constructed and financed by the applicant, who must often post financial guarantees to ensure completion of the work. Specify who conducts the inspections and in what time frame as well as the conditions for the subsequent full or partial release of the performance guarantees.

Finally, some agencies provide that preliminary approvals are valid only for a specific time period, typically a year. If construction has not begun or final plans have not yet been submitted within the specified period, the preliminary approval is no longer valid. However, the one-year time frame is increasingly out of step with the pace and complexity of most development projects. A better approach is to base the initial life of the preliminary approval on a realistic time period that reflects the size and complexity of the project. At a minimum, applicants should be able to apply for extensions for additional periods of at least one year. Applicants should not have to resubmit their entire project for approval.

Customer Service

Employees should be trained to see their role as facilitators—not adversaries—in the approval process. The purpose of zoning is to ensure that local agencies get the kind of development they want. Staff should be able to explain what kind of changes might be made to improve an application. Attentive and helpful customer service helps to create trust and confidence among applicants. Agencies should establish periodic meetings with builders and developers to generate input to improve permit services and gauge efforts to streamline procedures.

- **Push approval authority downward.** Adjust categories of permits and projects to reduce the number applications that receive a higher level of review than necessary.
- **Cross-training.** Cross-training of staff reduces specialization and thus enhances staff understanding of how various development standards and issues relate to each other. It improves coordination and helps expedite the approval process. It also increases the number of employees who are able to staff the central permit information desk. Counter staff should have the authority to sign off on permits or licenses that require little or no review.[23]

[22] *Id.*

[23] *Id.*

CHAPTER 7

Making Well-Reasoned, Unbiased Decisions

IN THIS CHAPTER

Decision-Maker Preparation

Promoting Fairness: Avoiding Bias and Conflicts of Interest

Establish Norms and Guidelines

Responding to New Information

Making the Decision

Well-prepared and engaged decision-makers are not only practicing good public service (and hence politics), but also good risk management. Public hearings provide the applicant and concerned community members an opportunity to offer their thoughts on a proposed project. The applicant receives a fair hearing and a chance to rebut any evidence offered in opposition.

First and foremost, the decision-maker's job is to apply the agency's land use policies to the project in a way that best serves the community's interests. This can involve dealing with tensions between the desire to "do right" by individual project applicants and being consistent with the general plan, which is likely the result of extensive thinking and public input about what land use policies make the most sense.

Another goal is to have all decision-makers respectfully hear and carefully consider the participants' perspectives, irrespective of whether decision-makers ultimately agree with them. Hearings that appear to be just "going through the motions" of soliciting either the project proponent's or concerned community members' input will understandably anger participants, who will be more likely to sue if they feel their views have been given short shrift.

Decision-Maker Preparation

The process of applying policies to a specific application can be highly complex and technical. Decision-makers who have thoroughly reviewed their agenda packets and have prepared for the hearing are most likely to make the wisest decisions and inspire confidence in the process. They are also most likely to engage in decision-making that withstands judicial review.

Decision-makers will likely have two kinds of questions as they review the agenda materials. The first are clarifying questions that can be asked in advance of the hearing and avoid unnecessarily slowing the meeting down. Staff generally welcomes the opportunity to answer questions and provide additional background information before the meeting.

The other kind of question relates to evaluating information that may be an important factor in the final decision. This kind of question is generally posed at the hearing so that the applicant, the public and all decision-makers can hear the answer. Staff generally welcomes knowing key decision-maker concerns in advance in order to assure that the critical issues are well researched before the hearing. This also provides staff with the opportunity to alert the decision-maker to any legal issues that might be implicated by a certain line of questioning.

Promoting Fairness: Avoiding Bias and Conflicts of Interest

Hearings should be conducted by a reasonably impartial decision-maker.[1] A number of factors can undermine participants' faith in decision-makers' impartiality; these factors can also provide a basis to challenge the agency's decision.[2]

One is having a financial interest in the outcome of a decision. Generally, an official may not participate in decisions that might have an impact on the official's own finances.

- **Conflict of Interest Laws.** These laws generally require public officials to refrain from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision could have a "material financial effect" (positive or negative) on that official's financial interests.[3] There are many kinds of financial interests that may require a decision-maker to disqualify him or herself from participating in the decision. One that comes up with some frequency in land use decisions is owning property near the property that is the subject of the decision.
- **Due Process Considerations.** The way in which hearing officers are hired can also present issues under state and federal due process laws. For example, in a permit revocation case for a sexually-oriented business, an appellate court cautioned against using methods that could result in practices that tie hiring decisions to an agency's satisfaction with the particular hearing officer's decision.[4]

Another basis for challenging the fairness and impartiality of decision-makers in quasi-judicial proceedings relates to having strong personal opinions or loyalties relating to either the parties in the hearing or the merits of a decision.

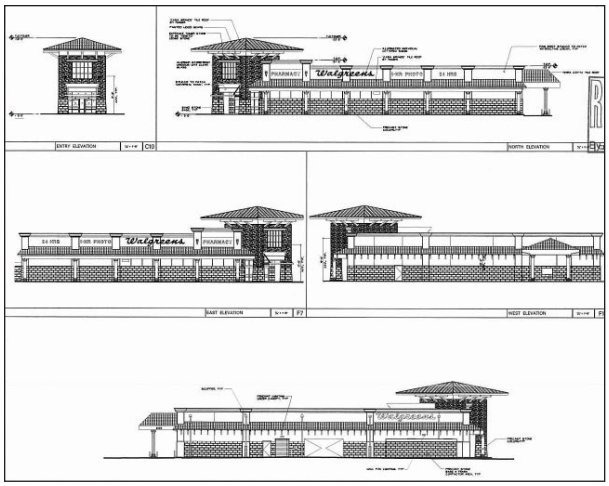
[1] *Gai v. City of Selma*, 68 Cal. App. 4th 213, 219 (1998).

[2] Dwight H. Merriam & Robert J. Sitkowski, *Procedural Due Process in Practice*, *Planning Commissioners Journal* (Summer 1998).

[3] *See* Cal. Gov't Code §§ 87100 and following.

[4] *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002).

- **Personal Interest in Decision's Outcome**. One court found that a decision-maker shouldn't have participated in a decision involving an addition to a neighboring property because the decision-maker was a tenant in a property that could have had its ocean view blocked by the proposed project.[5]
- **Personal Animosities or Loyalties.** Strong feelings toward a party to the proceeding can also be a basis for charges of unlawful decision-maker bias.[6]
- **Discrimination.** Courts do not generally inquire into the motives of individual members of a legislative body without evidence of an unconstitutional motivation, like racial discrimination.[7] The motives of the legislative body as a whole may be considered, however, in determining whether a land use law is discriminatory.[8]
- **Campaign Contributions**. Although not generally a basis for disqualifying a decision-maker,[9] receipt of campaign contributions under certain circumstances can require members of appointed bodies (for example, planning commissions) to disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements.[10]



- **Subject Area Biases.** Decision-makers in quasi-judicial proceedings should avoid statements and actions that suggest that they have pre-judged a matter before receiving full information in the course of a hearing.[11] For example, a court of appeal overturned a planning commission's decision after concluding that a commissioner's authorship of an article hostile to the project pending before the commission gave rise to an unacceptable probability of bias against the project. Thus, the commissioner should have disqualified himself from participating in the decision.[12]

For more information on these issues, see the Institute for Local Government's publication, *A Local Official's Reference on Ethics Laws,* available at *www.ca-ilg.org/elr*, or visit your state's ethics agency's website.

[5] *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996).

[6] *See Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n. 23 (2000).

[7] *County of Butte v. Bach*, 172 Cal. App. 3d 848 (1985).

[8] *Arnel Development v. City of Costa Mesa*, 126 Cal. App. 3d 330 (1981) (motives and legislative purpose are factors to be considered in determining whether a zoning ordinance is invalid as discriminatory).

[9] *See Woodland Hills Residents Association v. City Council*, 26 Cal. 3d 938 (1980).

[10] Cal. Gov't Code § 84308. *See* Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215; *See also Woodland Hills Residents Association v. City Council*, 26 Cal. 3d 938 (1980).

[11] *See Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547 (1994).

[12] *Nasha v. City of Los Angeles,* 125 Cal. App. 4th 470 (2004).

It is important to keep in mind that the laws relating to decision-maker bias and conflicts of interest create minimum standards. If participants in a decision-making process feel the process wasn't fair, they are more likely to sue even if they don't ultimately prevail. This is why it can be useful for land use decision-makers to be just as discreet in expressing their opinions about matters pending before them as judges are.

Another issue to consider is whether a decision-maker should *voluntarily* abstain from participating in a decision if members of the public or the applicant might reasonably question the decision-maker's inclination to fairly evaluate the information presented in a quasi-judicial hearing. Even if the law does not, strictly speaking, disqualify an official from participating, voluntarily abstaining can underscore a decision-maker's respect for the public's perception of fair decision-making, and it can be a prudent risk management strategy.

Conflicts Associated With Property Ownership

State laws designate when property ownership may rise to the level of a conflict of interest. Having a clear sense of where one's property interests are and how matters coming before your agency may affect them is critical.

- **Who Owns It?** Officials can be affected by property owned personally or by their immediate family, including a spouse, domestic partner, or dependent children.[13] Also be alert to any properties owned by any business entity or trust in which the official or the official's immediate family own a ten percent interest or more.[14]
- **Value Threshold.** If the interest (or family interest) in the property is $2,000 or more in fair market value, then the conflict of interest rules apply.[15]
- **Type of Interest.** Be concerned about any leasehold, beneficial or ownership interest or an option to acquire such an interest. Month-to-month tenancies are not considered an interest in real property under California conflict of interest rules.[16] However, because of the broader common law bias rules, it may be wise to also identify any properties an official rents.[17]

Once an official has identified which properties meet these criteria, the best practice is to check with legal counsel.

Tip: A number of agencies prepare maps that show the locations of all owned and rented property by those in your jurisdiction covered by the disqualification rules. Another useful practice is to do the reverse: draw a 500-foot radius around any projects before the agency so that decision-makers can compare the two maps to determine whether there is any overlap.

Establish Norms and Guidelines

How the meeting is run also affects the perception of fairness. Public hearings are serious proceedings where decisions are made that affect valuable property rights and community character. Given the financial and emotional stakes involved, all participants – officials and public alike – must treat each other with the utmost sincerity, courtesy, dignity and respect.

Disorderly meetings create confusion and resentment. Indeed, sometimes the public hearing evolves into an adversarial process. But the local agency role is to evaluate the project or proposed legislation, not necessarily to oppose or support it. While staff recommendations often depart from the vision of the applicant in some way, the overarching process goal should be to examine facts, gather input, and resolve potential conflicts in a way that best meets the objectives of the general plan.

[13] *See* Cal. Gov't Code § 82029. The term "spouse" includes registered domestic partners recognized by state law. 2 Cal. Code Regs. § 18229.

[14] *See* Cal. Gov't Code § 82033 (definition of "interest in real property").

[15] *Id.*

[16] 2 Cal. Code Regs. § 18233.

[17] *See, for example, Clark v. Hermosa Beach*, 48 Cal. App. 4th 1152 (1996) (finding common law bias where decision-maker was a month-to-month tenant in a property that could have had its ocean view blocked by a proposed project).

Most meetings follow *Robert's Rules of Order*. However, more specific guidelines can also help maximize the civility and productiveness of decision-making proceedings. Such policies vary among agencies, but often include the following elements:

- **General Decorum.** It is always inappropriate for anyone to ridicule, disparage, threaten or in any other way demean any other participant. Testimony and information presented should address the merits of a specific project or policy that is under consideration—not motivations, character or personalities.
- **Rules for Speaking.** Time for applicants, staff, and opponents to speak should be clearly designated and respected. Time should also be set aside for the decision-making body to discuss issues and make motions without interruption.
- **Timely Submittals.** Last minute revisions in key documents, like the staff report, cause confusion. They also place the public in an awkward position of having to quickly review the changes at the hearing, leaving less time to formulate comments. Encourage applicants and members of the public to submit information early so that everyone involved will have an opportunity to review it.
- **Decision-Maker Engagement.** Members of the decision-making body should remain engaged in the process and actively listen to testimony. They should not have conversations among themselves, leave their seats, or otherwise take actions that telegraph disinterest in the proceedings or disrespect for participants. In one case, a court overturned a decision because decision-makers were talking on cell phones and otherwise being inattentive during an applicant's testimony.[18]

These norms should apply to everyone involved in the meeting, including the public, applicant, staff, and decision-makers. It is usually the responsibility of the presiding officer to enforce such policies and norms.

Other Strategies for Good Meetings (And Reduced Risk)

These methods will often provide those who participate in the meeting with the confidence that the process was fair and their points were considered:

- **Training in *Robert's Rules of Order*.** It's important that the rules for the meeting be applied with certainty. When those in charge do not know the rules, it's easy for participants to have less confidence in the entire process, including the final decision.
- **Background Information.** Local governance is complex. Participants may not understand the context of the decision being made. Effective education and communication programs will help everyone better understand the review process. For example, a group opposed to a rezone for an affordable housing project may not understand that the agency is acting to meet a state-imposed fair share housing requirement.[19] Background information that explains such processes will provide participants with greater perspective.
- **Speaking Tips for Public Participants.** Provide participants with tip sheets about how to best make their points in a limited time period. Encourage them to introduce themselves and their relationship to the proposal and focus on one or two points. To reduce repetitive testimony, suggest that they coordinate their comments with other like-minded participants.
- **For Legislative Decisions, Consider Non-Traditional Formats.** Quasi-judicial processes should be run more like a court hearing. But legislative hearings have more flexibility to consider alternative means of public participation. For more information, see *Getting the Most Out of Public Hearings: Ideas to Improve Public Involvement* (*www.ca-ilg.org/publichearings*).

[18] *See Lacy Street Hospitality Service v. City of Los Angeles*, 22 Cal. Rptr. 3d 805 (2004) (depublished 2005 Daily Journal D.A.R. 84). This case may not be cited as precedent and is provided here only as an illustration.

[19] Cal. Gov't Code §§ 65580 and following.

Responding to New Information

The hearing itself is a dynamic process. New and significant information may be presented that raises additional questions that staff or the applicants are not prepared to answer. Alternatively, the decision-maker may decide to deviate from the approach being recommended by staff. To the extent that it's relevant to the final decision, this new information will need to be reflected in the agency's findings.

If the timeline for acting on the project permits, one way to respond to new information is to continue the hearing so that participants can either research an issue further or prepare additional documents that will ultimately support the decision and provide a solid basis for judicial review. Another option is for decision-makers to make a tentative decision only, and postpone the adoption of formal findings, conditions and conclusions to the next meeting. The continuance will allow the staff sufficient time to prepare formal findings that will support the decision, and, if necessary, incorporate any new evidence.

Making the Decision

Ideally, land use decisions should be based on objective criteria applied consistently across all projects. In practice this is difficult to achieve. On one hand, decision-making standards should be flexible enough to address the unique characteristics of each development, such as location, use, parcel size, and neighborhood character. On the other hand, decisions should also remain consistent enough to establish a degree of certainty and predictability for the community.

To achieve consistency, agencies are well advised to focus on well-defined principles, set priorities when principles conflict, and offer clear

Considering the Testimony of Vocal Groups

Sometimes, it becomes difficult to make the "right" decision when there is stiff opposition in the community. Typical scenarios include people who believe that a project might affect the character of their neighborhood or harm the environment. This problem becomes particularly difficult for decision-makers when vocal groups show up at a hearing to protest a project or action.

The question for decision-makers is how should they weigh such opposition? Certainly opponents' views should be heard and considered. But consideration should also be given to whether the views of those testifying represent the opinion of the community as a whole. Indeed, the people who did not show up for the hearing may also have views—it's less common for people who support a project to come out in large numbers. If the proposal affects hundreds or thousands of residents and fifty show up at the hearing, it could be fair to say that the fifty may not represent the affected majority.

On the other hand, the decision-makers must also consider why the particular individuals appeared at all. It might be that their properties or lives will be the most affected by the decision. In other words, consideration of the vocal group's testimony should be made in the context of the entire community.

There is often no "right" answer in these situations. But it is often helpful for the decision-maker to explain why a particular course of action was taken, especially when the basis for the decision is linked to values that most people share. There will always be a few who will remain upset and may even sue. The very nature of public decision-making means that you cannot please all the people all of the time. However, making those decisions in a way that respects alternative viewpoints can go a long way toward maintaining civility and minimizing the inclination to seek redress in court.

explanations when exceptions are made. After all the evidence is in, it's ultimately up to the decision-maker to make a decision. Usually, there are three options: approve the proposal, deny or reject the proposal, or modify or place conditions on the proposal. Regardless of the ultimate action taken, decision-makers should be ready to explain how they reached the decision in light of the applicable criteria, whether it be the general plan, zoning ordinance or state statute.

Once made, the decision-making body issues a written decision that describes some or all of the following elements, depending on the decision and agency practice:

1. The actual decision, including any conditions imposed on or modifications to the proposal
2. The standards applied to the decision
3. Findings of facts upon which the decision was based and the conclusions derived from those facts
4. A statement explaining the process to appeal

Again, this is a point where local agency processes can vary. However, the general goal is that each applicant and the public should know whether a project or ordinance has been approved or denied and the reasons for that action. In the specific case of a denial of a specific project, the final decision should also explain the extent to which changes could bring the project within agency parameters.

Discrimination Is Illegal

Note that discrimination based on the race, sex, color, religion, ethnicity, national origin, ancestry, familial status, disability or age of the intended occupants of a housing project is unlawful under federal and California law.[20] Discrimination based on the occupants' status as low-, moderate- or middle-income is also unlawful.[21] Local agencies must make one or more specified findings when disapproving affordable housing developments or imposing conditions that make the project infeasible.[22]

[20] *See* 42 U.S.C. § 3601 and following; Cal. Gov't Code § 65008. *See generally Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001).

[21] *See* Cal. Gov't Code § 65008.

[22] *See* Cal. Gov't Code § 65589.5.

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CHAPTER 8

Findings

IN THIS CHAPTER

Form and Adequacy

Timing Issues

Findings are written explanations of why—legally and factually—local agencies made a particular decision. They map how the agency applied the evidence presented to reach its final conclusion. As a result, findings must trace a logical path—or "bridge the analytic gap"—between the evidence presented to the agency decision-makers and their ultimate decision.[1]

Findings facilitate orderly analysis and assure that agency actions are grounded in reason and fact. They also offer an important opportunity to show how the agency's decision promotes the public's interests. In addition, findings:[2]

- **Assure Process Integrity.** Findings impose a certain discipline on decision-making processes, enhancing the integrity of the process and assuring principled decision-making.
- **Encourage Interagency Communication**. Findings can explain the basis of the agency's decision.

[1] *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974).

[2] *Id.*

- **Assure That Standards Are Met.** Some laws require that certain findings must be made before the agency can take a particular action.
- **Help Courts Interpret the Action.** Courts often look to the findings to determine the underlying rationale for an action or requirement. Findings provide support for a local agency's decisions and an opportunity to tell its side of the story.

Thus, findings should be developed with at least five audiences in mind: the agency governing body, the general public, interested parties, other governmental entities, and courts. In addition, it is sometimes a good idea to develop findings even when they are not required, particularly for decisions that may be controversial or lead to litigation.

Form and Adequacy

Findings should always cover the basic requirements of any decision. For quasi-judicial decisions, the findings must be supported by substantial evidence in light of the entire record.[3] Findings are always required when local agencies are acting in their quasi-judicial capacity—like the approval of an individual permit. Although findings are not generally required for most legislative decisions, they are sometimes required by statute in certain circumstances, such as when an agency adopts a moratorium. However, a findings requirement does not transform a legislative decision into a quasi-judicial act.[4]

Findings must adequately describe the reasoning for the decision. Thus, ambiguous, conclusory or "boiler plate" language is inadequate.[5] They also should address *all* the relevant criteria governing the decision. However, the decision-making body does not need to develop "new" findings in each circumstance. For example, it's appropriate for a council to adopt by reference the findings of the planning commission when they make the same decision (for the same reasons).[6]

Findings should be thought of strategically, particularly if the threat of litigation looms. Ultimately, if the agency's action is challenged in court, the court will look to the findings to determine whether there is substantial evidence to support the agency's decision. As a result, the findings should include detailed information that connects the dots as to why the agency took the action:

- Why was the regulation adopted, rejected, or amended?
- Why was the application approved or rejected?
- How does the decision meet relevant statutory requirements?
- How is the decision consistent with the general plan?
- What is the connection between the action and the benefits of the project?
- What public policy interests are advanced by the decision?

[3] *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205 (2000).

[4] *ABS Inst. v. City of Lancaster*, 24 Cal. App. 4th 285 (1994).

[5] *Honey Springs Homeowners Assn. v. Board of Supervisors*, 157 Cal. App. 3d 1122 (1984).

[6] *Dore v. County of Ventura*, 23 Cal. App. 4th 320 (1994); *Carmel Valley View Ltd. v. Board of Supervisors*, 58 Cal. App. 3d 817 (1976).

Avoid equivocal phrases like "could cause," "might result in," or "may increase." Public agencies must support decisions with evidence and language that is more certain. In one notable case, the U.S. Supreme Court took issue with one city's finding that the dedication of land for a bicycle path "*could* offset" the traffic demand caused by the proposed development.[7] The indefinite nature of the finding did not establish that there was the necessary reasonable relationship between the dedication and the impact of the proposed development.

Another issue that arises is how thorough the findings should be. In many cases, such as deciding to deny a tentative map, there are multiple grounds upon which the denial may be authorized. A negative finding on any one ground is sufficient to support the denial. In almost all cases, however, the decision-maker should make findings on each issue. There are at least two advantages to doing so. First, assuming that there are additional grounds for the denial, it will provide an alternative basis for upholding the decision in the event that a court later invalidates one of the grounds for the decision. Second, making both negative and positive findings regarding different requirements indicates to the courts that the agency evaluated the application fairly.

Just Because

One of the simplest techniques to assure that findings sufficiently draw a connection between action and underlying impact or rationale of the proposed action is to use the word *"because."* This word naturally connects the reasoning to the legal principle. For example:

- "The project is inconsistent with Section III (A) of the housing element *because* only 3 percent of the units will be affordable instead of the required 15 percent."
- "The 100-foot-wide buffer does not threaten bird and wildlife migration *because* the biologist's report notes on page 32 that 65 feet is sufficient for each species in the project area."

Timing Issues

How findings are drafted and adopted varies—there is no perfect way to do it. Given that one of the several roles of findings is to assure orderly decisions that draw logical connections between evidence and conclusions, the findings should be formed *before* the final decision is made. Of course, in the give and take of the land use process, there is not always time for the decision-maker to develop the appropriate findings from scratch after the public hearing has closed.

Instead, the staff report typically includes a proposed set of findings that support staff's recommendation. These suggested findings help decision-makers identify the appropriate information, policies, and regulations governing the proposed project and guide them in making the necessary findings.[8] Assuming that the decision-maker reaches the same conclusions and decision as staff, the draft findings will need little or no change. But when the decision-maker elects to take a different approach, new findings will need to be drafted.

In either case, it's typical for the body to make a tentative decision and explain its reasoning to staff. Staff can then draft the findings and return them to the agency at the next meeting, where the decision can be finalized and the findings adopted. To be safe, decision-makers should take the time at the subsequent meeting to objectively review—and when necessary—revise the draft findings to make sure that they accurately reflect both the evidence in the record and their own conclusions. This process also affords staff the opportunity to closely review the decision-making rationale. If evidentiary gaps are identified during the drafting process, staff can raise them at the subsequent meeting before the final decision is made.

[7] *See Dolan v. City of Tigard*, 512 U.S. 374 (1994) (emphasis added).

[8] *See* James Longtin, *Longtin's California Land Use* § 11.53 (2d ed. 1987 & Supp.).

In some instances, however, the timelines for making the decision imposed by the Permit Streamlining Act may not allow the issue to be postponed to the next meeting. In these cases, decision-makers must articulate their findings orally at the meeting for staff to record. The challenge in such a situation is to develop findings "on the fly" that specifically describe the reasoning for the decision or actions taken. The following five-step process, however, will help in such situations:

- State the impact (either positive or negative) of the project.
- Cite the source of the information (for example, a study, testimony, or other evidence).
- Refer to the relevant governing statute, regulation, or ordinance.
- Link findings to general plan goals and objectives.
- Describe in detail why or how the project's impact either meets or fails to meet the requirements included in the statute, regulation, or ordinance.

Another approach is to include two proposed sets of findings in the staff report. For contentious issues, the report can identify the nature of the controversy and propose a set of findings for each decision that could be made. For the typical project application, there would be a set of findings if the project was approved and an alternative set of findings if the project was denied. This method, however, has at least three drawbacks. First, it creates more work for staff. Second, the unused set of findings provides a "blueprint" for anyone who wants to appeal or challenge the decision in court. Finally, it can be confusing to the public; many will find it hard to understand how the same set of facts can be used to support findings for opposite outcomes.

Top Ten Practice Tips for Findings

10. **Do a Risk Assessment.** "Perfect" findings cannot be drafted for every decision. When pressed for time, actions that pose the most risk should have the best findings. Assess potential risk by evaluating the level of controversy, complexity of the decision, location, size of project, public interest, or other relevant factor.
9. **Involve Everyone.** Findings usually have both a legal and factual element. Thus, all relevant agency staff should review findings to assure factual accuracy and sufficiency in the legal context.
8. **Allow Adequate Time to Prepare.** Ideally, the legislative body will issue a tentative decision and allow staff time to draft specific findings in support of the body's decision. When such time is not available, staff should anticipate the most likely outcomes and be prepared for each.
7. **Include Findings in the Staff Report.** Including findings in the staff report makes it easier for the legislative body to respond to and augment the findings.
6. **Incorporate Staff and Public Testimony.** Staff and public testimony is often important to the final decision. Where possible, incorporate arguments and facts provided by such testimony into the record.
5. **Incorporate Expert Testimony.** Consider having the agency's experts make a short statement at the hearing regarding their conclusions.
4. **Don't "Parrot" the Statutory Language.** Instead, specifically explain how the language applies to the decision at hand.
3. **Provide a Complete Record For Appeals.** On appeal to the governing body, make sure that there is as complete a record before the city council or board of supervisors as there was before the planning commission
2. **Incorporate by Reference.** Findings may be incorporated by reference where such findings are directly on point. But, it is still a good idea to add additional findings that are specific to the decision or action at hand.
1. **Never Use Humor.** Findings aren't funny.

A Case on Point: Toigo v. Town of Ross

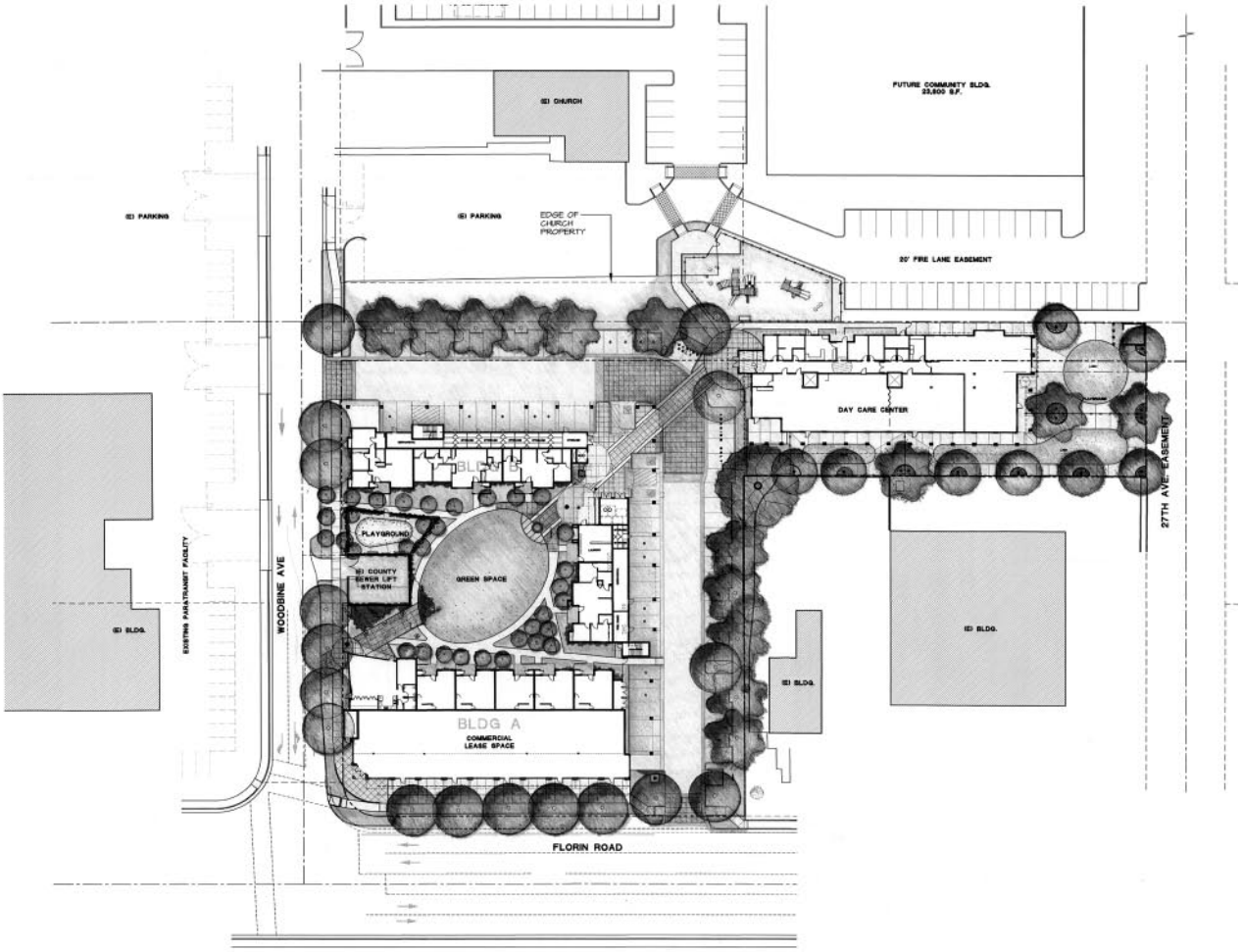
Toigo v. Town of Ross[9] involved a second application to subdivide a 36-acre hillside lot into five parcels. The owner had unsuccessfully sued the town after it denied the first application. The town found that the second application was not much different and, in some instances, more environmentally severe than the first. Thus, the town council was inclined to deny the proposal a second time.

This placed the town in a difficult position. A second denial could expose the town to litigation. (For purposes of takings claims, courts sometimes determine a decision is "final" after the second application has been denied). In response, the town drafted a set of findings that was 38 pages long—hardly a typical response to the denial of a five-unit subdivision. The findings detailed how the proposal was inconsistent with six subdivision standards, two zoning provisions, eleven roadway and driveway design standards, eight hillside lot criteria, and ten design review standards.

Was the scope of these findings too detailed for a denial of a five-unit subdivision? Probably not in light of the threat of litigation. Ultimately, the town prevailed. An appellate court dismissed the takings claim as unripe. In its opinion, the court held that the owner had failed to submit a "meaningful application" and "made no attempt to alter their vision" of the intensity of development.

This case demonstrates that a well-reasoned set of findings can be the "ounce of prevention that prevents a pound of cure;" in this case a takings liability claim. The town's care also created a positive legal precedent that will benefit other public agencies and underscores the importance of findings as a key point in the entire process where the agency can lay out its side of the story.

[9] *Toigo v. Town of Ross*, 70 Cal. App. 4th 309 (1998).



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CHAPTER 9

Appeals

IN THIS CHAPTER

Issues in Procedure Design

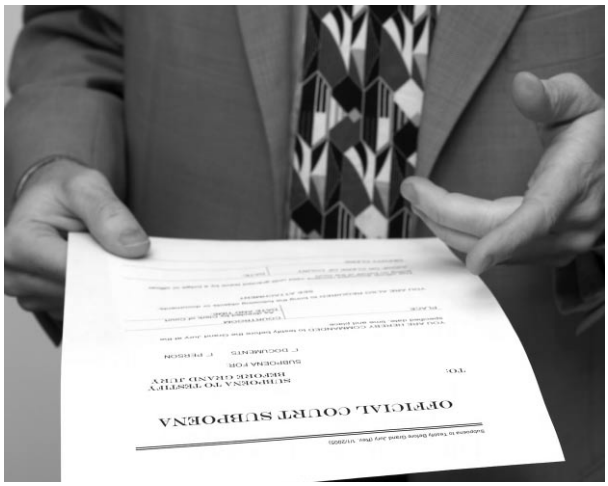
An agency's appellate procedures are an important risk management tool. Appeals procedures allow local agencies a second chance to look at a decision to assure that it has been made fairly. Well-designed procedures allow the appellate body to correct procedural mistakes, or reverse decisions that are clearly contrary to law. They work to assure that the actions of staff and lower decision-making bodies track with the policy goals of the elected body. This serves as a safety valve to allow the agency to avoid unnecessary litigation.

The appeal procedure also flags disputes that are more likely to result in litigation. Appellants must exhaust all administrative remedies and procedures before filing a claim with a court. This accomplishes two things: first it gives the parties as many chances as possible to reach a mutually agreeable decision, and second, it means that only true controversies will be filed with the court. Thus, the appeal process allows local agencies a second opportunity to visit these disputes to assure that the agency is indeed prepared to stand by its decision. In the alternative, the agency may decide to reverse (or modify) the decision when the evidence suggests that such an action is necessary.

Issues in Procedure Design

Appellate procedures should allow the decision-making body to fully review the lower decision and account for any additional information or considerations that will yield a fully informed decision. To this end, appeals procedures are usually spelled out in a separate section of the agency's code. Typical provisions of a well-developed process include:[1]

- **Jurisdiction.** For many agencies, all appeals are taken up with the main governing body. However, other agencies delegate specific matters to specific bodies, such as the planning commission or other boards for historic preservation, design review, or rent control.
- **Eligibility.** Typically, anyone affected by a staff or lower body decision may file an appeal. Thus, it's not always the applicant appealing the decision. In some instances, more than one party may appeal the same decision for different reasons (for example, an applicant and an environmental group). These actions can be joined if the parties each file a timely appeal.
- **Timing and Form**. Most agencies require that an appeal be filed within ten to fourteen days after the notice of decision was mailed. The appeal should include a written statement of the findings or conclusions being appealed and the relief sought. Many agencies require a filing fee; some agencies allow for a petition with a minimum number of signatures of residents (or residents within some distance of the subject property) in lieu of a fee. Another practice is to require filing in person (either by an applicant or representative) to eliminate disputes about when the appeal was mailed or received.
- **Governing Body's Own Motion**. Many agencies also allow the governing body, under its own motion, to review a lower decision. In implementing such a procedure, care should be given not to create the appearance that the governing body is prejudging the matter by assuming jurisdiction over the decision of a subordinate body.[2]



- **Scope.** Any action, failure to take action, or determination of meaning or applicability of a regulation or policy can be appealed, including decisions on entitlements, determinations of completeness, determinations of state law compliance,[3] and decisions to certify or exempt a project under CEQA. Alternatively, appeals can be limited to key decisions along the process, to avoid a result where every small determination may be appealed.
- **Effect of Filing**. Usually, filing stays (delays) the action until a final decision on the appeal is made.
- **Withdrawal of Appeals**. Withdrawal of an appeal can be allowed. More intricate processes can also be drawn to include whether all appellants must withdraw a multi-appellant appeal, or in the case of an appeal supported by a petition, whether every signatory must sign the withdrawal. Once an appeal is filed, other potential appellants often do not file separate appeals, particularly

[1] *See, for example*, Dublin, Cal., Code §§ 8.132.010 and following, Pasadena, Cal., Code §§ 17.72.010 and following, Santa Barbara, Cal., Code §§ 1.30.010 and following.

[2] League of California Cities, *Model Guidelines For Avoiding Unconstitutional Commingling of Functions In Adversarial Proceedings* (2004); *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205 (2000); *Cohan v. City of Thousand Oaks,* 30 Cal. App. 4th 547 (1994).

[3] Cal. Gov't Code § 65943.

if there is a filing fee. If the original appeal is withdrawn after the deadline for filing, those who did not file separately may feel like they have been denied the right to air their concerns. Clear rules governing withdrawal puts everyone on notice.

- **Notice and Hearing**. Notice should include the name of the applicant, the parcel affected, time and place of the hearing, and a description of the decision being appealed. Typically, notice is given at least 10 days prior to the hearing. Some appeals are closed to all but the applicant, the appellant (if different) and a staff representative. Usually oral presentations are involved, though some agencies allow for written arguments. Many agencies transcribe the procedure. At a minimum, it's a good practice to videotape the procedure.
- **Level of Deference.** Many appeal procedures allow for "de novo" review, meaning that the appeals body can review the case without giving weight to the original decision. However, processes can be designed to give weight to certain decision-makers who have special expertise (for example, historic preservation boards).
- **Consideration and New Evidence**. Unless the appeal is heard de novo, most procedures limit the extent to which new evidence can be produced, thereby assuring that the appeal is based upon the original application, plans, and materials submitted by the applicant. However, many agencies allow the applicant some flexibility if it will help resolve the dispute. To the extent that new evidence will be involved, it should be submitted well in advance of the hearing, and the appeal body may elect to refer the matter back to the original decision-maker.
- **Vote Requirement**. A good practice is to spell out the number of votes required to reverse the underlying decision. A typical requirement is a majority vote of either those present or the entire body. Any other vote would then constitute a denial of the appeal. If the review authority fails to act upon an appeal (for example, due to a deadlock), the decision from which the appeal was taken is generally deemed affirmed.
- **Form of Decision**. Typically, the appeals body can grant the appeal, grant the appeal with modifications or conditions, or deny the appeal. Some agencies allow the issue to be remanded back to the original decision-maker to consider particular issues.
- **Findings.** The procedure should require that findings that support the decision be adopted in writing, including specific findings for new conditions or modifications imposed. Many agencies provide that the findings of the lower decision-maker can be adopted by reference.
- **Effect of Appeal**. Many provisions also indicate that the decision on an appeal vacates (voids) the previous decision from which the appeal was taken. The decision becomes effective upon issuing the final decision or any other date set by procedure.

A well-designed appeals process allows the agency to closely examine the actions that are likely to be challenged and gain new information. This will do one of two things. If the information strengthens the claims made by the person or group filing the appeal, the appellate body can make a better decision. In the alternative, a good procedure allows the agency to get more information on the record that will support its decision once the action is challenged in court, making it more likely that the court will find in favor of the agency in the ensuing litigation.

Practice Tip

Appeal procedures are one of those things that can be on the books for a long time without a second thought until a conflict arises that puts them to the test. There is no way to foolproof appeals procedures for every contingency. However, a good practice is to periodically review them to with an eye toward closing loopholes, increasing efficiency, and assuring fairness.