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Winning Development Strategies for Land-Use Attorneys

**Practical advice for advocating
development projects before
public agencies**

**By Martin N. Burton
Alvarado, Smith & Sanchez**

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Practical advice for advocating development projects before public agencies

In feudal Japan, Samurai warriors swore allegiance for life to a local lord. If a lord was killed, his Samurai were released from their pledge of loyalty and became Ronin, or Samurai-for-hire. Today, a class of Roninlike land-use attorneys has arisen in Southern California. These practitioners, perhaps once loyal vassals to a public or private agency, are now free of their previous pledges. With their insider's knowledge of land use, they can attach themselves to a variety of clients with development projects spread throughout the multiplicity of jurisdictions in the greater Los Angeles area. As members of an elite group, these practitioners will rarely reveal publicly the deepest secrets of their success. But every successful land-use attorney has mastered the sacred principles that all practitioners should follow when advocating a development application.

In Southern California, the practice of land-use law (the law and procedures that govern the use and development of real prop-

erty) is certainly one of the most dynamic and complex in the country. The web of overlapping legal regimes found in the region is no less chaotic than the patchwork government of feudal Japan. Los Angeles County alone comprises no fewer than 88 separate municipalities, each with its own provisions for developing property within its boundaries. Altogether, Los Angeles, Orange, Ventura, Riverside, San Bernardino, and Imperial Counties contribute 184 municipalities to the Southern California Association of Governments, the regional council of governments that gathers demographic information and, more or less, sets certain planning standards. But that is only the beginning: to these municipalities must be added the county governments themselves; the myriad redevelopment, housing, cultural affairs, planning, and other commissions and districts within each county

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and municipality; the California Coastal Commission, which regulates development within approximately 1,000 yards of the coastline; the South Coast Air Quality Management District, which issues permits that are required for projects in other jurisdictions; and other agencies too numerous to mention.

Land-Use Law

The substantive provisions of land-use policy and procedure

are easily accessible through several basic texts.¹ These texts teach that land-use practice draws upon a relatively small number of statutes, which fall into three primary categories. First are the general planning and zoning laws, which themselves may be divided into three categories of statutes, relating to 1) planning agencies, commissions, and departments,² 2) the general plan and specific plan,³ and 3) zoning regulations.⁴

The second category of laws relates solely to particular kinds of land-use approvals. Among these laws are:

- The Subdivision Map Act,⁵ which regulates subdivisions of land.
- Statutes regulating property development agreements,⁶ which are contracts binding a govern-

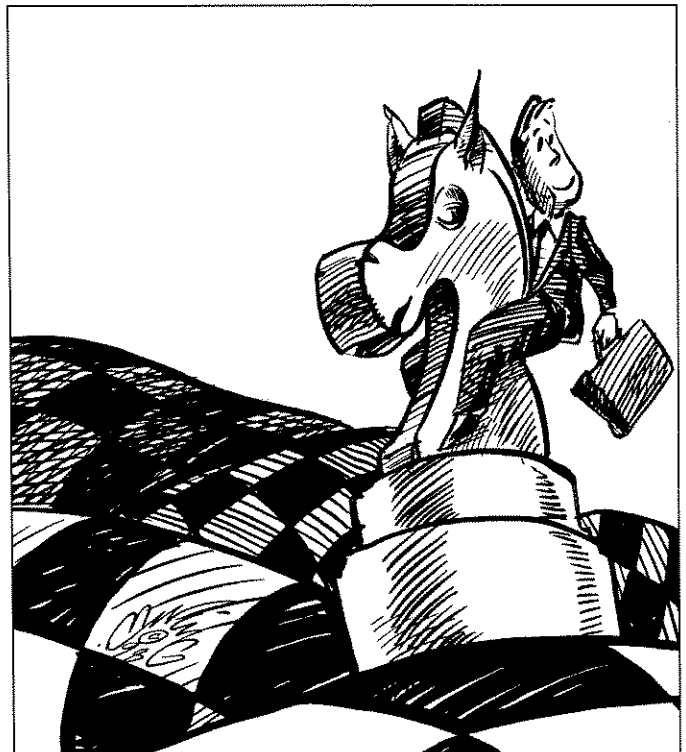
mental body and a developer to a prescribed development.

- The California Coastal Act of 1976,⁷ which governs development activities along the state's coastline.

- The California Community Redevelopment Law,⁸ which regulates activities within redevelopment project areas.

Most of these statutes, fortunately, are of importance only to practitioners who handle land-use matters that involve the respective specialty.

The third general category comprises laws that have created legal regimes unto themselves, whose presence pervades every aspect of land-use decision making: the California Environmental Quality Act⁹ and the CEQA Guidelines,¹⁰ the Ralph M. Brown



Act,¹¹ and the Permit Streamlining Act.¹²

CEQA is the most complex of the three, although it starts with a simple premise: to educate decision makers and the public on the environmental impact of a project.¹³ The key to understanding CEQA is that the Environmental Impact Report (EIR) that CEQA requires¹⁴ is primarily a *disclosure* document. The law neither mandates that an environmentally harmful project be rejected, nor offers a royal seal of environmental acceptability. CEQA seeks only to ensure that the environmental impact of a project, after appropriate mitigation is undertaken by the developer, is fully disclosed.¹⁵

The Brown Act, also known as the Open Meeting Act, seeks to ensure that meetings of a public body are held only pursuant to noticed, open hearings.¹⁶ Aside from the curious exemption from the law that the state legislature granted to itself, the most distinguishing feature of the Brown Act is that it prohibits a majority of decision makers (typically, three members of a five-person body) from meeting privately to discuss a matter on which they will make a public decision.¹⁷ Significantly, it does not in any fashion prohibit a project applicant from meeting directly with a decision maker.¹⁸

The Permit Streamlining Act establishes the important deadlines by which a public agency must act on a development application.¹⁹ These are not the only deadlines imposed upon a public agency; other statutes, such as CEQA, also prescribe mandatory time periods for taking action.²⁰ Most noteworthy is the provision of the Permit Streamlining Act that provides for "deemed approval" if the agency fails to meet the deadline when acting on a development application.²¹ Deemed approvals, contrary to what many skeptics believe, are not impossible to obtain. In fact, the skilled land-use practitioner can use the act as a potent weapon against delay.²² For example, a deemed approval for a housing project in which staff had sought to impose a horse trail was confirmed by a commission vote. Approving the project on this basis allowed the decision makers to shift the responsibility for eliminating the trail to the staff. But even without the deemed approval remedy, the act can be used to force staff to provide a needed response (for example, what specific items are missing from an application), to create a needed record (for example, the date an application is accepted as complete), and otherwise to keep the application on track.

Basic Practice Principles

In addition to becoming well versed in these general state laws, the land-use attorney must become an astute student of the par-

ticular customs and political climate of individual localities. While each locale exhibits its own idiosyncrasies, some principles can be applied in virtually all settings. The most fundamental principle, which should be invoked like a mantra at the start of every land-use engagement, is never to attribute to evil intentions what can just as easily be explained by incompetence.

Those unfamiliar with the land-use decision making process may mistakenly assume that everything that goes on behind closed doors is somehow evidence of evil minds conspiring to defeat a client's objectives. The result is a counterproductive suspiciousness of any request of staff, a defensive attitude, and, ultimately, a shrill presentation. The experienced practitioner understands that in the real world miscommunication, inattention, and honest mistakes far outnumber instances of fraud, collusion, and blackmail. This is not to say that a land-use attorney will never face real enemies. But assuming that enemies exist will only result in the creation of more of them.

For example, a common source of frustration for the practitioner is to receive conflicting opinions or advice from representatives of two departments. At first it might seem as if the two departments have engaged in a plot of deliberate deception, but other explanations are equally plausible: there might be a failure to communicate—or a turf battle—between staffs or departments.

The astute practitioner will affirmatively facilitate communication between departments. Letters confirming all discussions and the particular matters agreed to should become standard practice (with copies sent to other relevant parties) so that no side can later claim a misunderstanding. Persistence is also required when departments do not communicate. In one case, after two months of unreturned phone calls, a request for a face-to-face meeting between representatives of two warring departments resulted in both pledging support for a project.

Behind the Scenes

As Marshall McLuhan recognized,²³ using the medium of an attorney sends an unmistakable message—usually that the client has unlimited resources or wants to threaten litigation. In land-use entitlement proceedings, however, neither is an appropriate message to send. Thus, the presence of a land-use attorney is generally most effective when it is felt but not seen in public. The attorney should help survey the political landscape; craft the strategy on what approvals to seek and how; interact closely with staff along the way by drafting findings, resolutions, and even memoranda of law; and guide the client

in a successful presentation.

No attorney should begin an engagement without first surveying the political landscape. Most significant land-use decisions are made during open-window periods within the political cycle. In most jurisdictions that window is closed in the six months prior to an election in which two or more seats are open. During those months, meaningful consideration of all but the most mundane projects grinds to a halt. The practitioner will mark the calendar accordingly and understand that a vote on a project is neither likely nor desirable during these critical time periods.

A land-use attorney must also identify and target the most powerful players early in the process. The naive may assume that this requires playing up to the most visible, outspoken, or influential of the decision makers. The truth, however, is much deeper.

Jurisdictions differ in their relationships among the governing body, staff, and other players. Some cities, for example, have a very strong planning commission with a very weak planning director. No matter how close the client's relationship with the planning director or how many compromises have already been made, when the matter comes before the planning commissioners, they will act as if they were the first to inquire about the project's impact on traffic.

In other cities, the opposite is true: the planning director is accorded great deference and the planning commission essentially validates the director's recommendations. In still other cities, this deference is accorded the city manager, or even a senior planner. And in a few smaller jurisdictions, the contract city attorney has been transformed into what, at times, is a decisive sixth council member.

These relationships assume even greater importance in more controversial projects, where the practitioner may have to engage in some investigative work. Frank discussions with two or three staff members may shed light on the real power relationships. Identifying and talking with recent applicants for similarly sized projects could also uncover informal power structures. Comparing staff reports to the decisions taken in the previous few months could help determine if decision makers generally follow staff recommendations.

The land-use attorney should always be looking for other clues. Even in initial discussions the attorney should ask whether staff will be making a recommendation on the project, as is customary. The answer will likely indicate whether the client's time would be better spent with staff or with commissioners. Other clues abound: which staff members will be making the presentation?

Identifying the status of the presenter (a summer intern instead of the planning director, for example) will indicate how important the project is perceived to be. The practitioner should also learn how similar projects have been treated in the recent past and consider why this project is likely to fare any differently before the same body.

After assessing the political layout, the practitioner needs to develop a strategy for approaching the application itself. In general, it is wise to choose the simplest, least intrusive procedure. For example, if a bank is already approved in a particular zone, propose that a freestanding ATM be considered as nothing more than a miniature bank. A "zone use determination" allows a commission to treat an unlisted use the same as a listed use, without amending the zoning code.²⁴ Or, consider a lot line adjustment in conjunction with a small subdivision in order to keep an application from reaching the five-parcel threshold of the arduous Subdivision Map Act.²⁵ And a covenant to hold two parcels as one may allow uses to cross lot lines without even having to process a lot line adjustment.

A list of all potential documents that may affect the approval should be assembled and reviewed. No land-use document can be ignored. One applicant's hopes to open a service station were crushed when, months after the planning department approved his plans, he learned that the redevelopment plan for the property expressly prohibited gas stations. Many sophisticated applicants have spent thousands of dollars and months in the entitlement process only to find that private, recorded covenants on the property forbid the very development for which they have received building permits.

Compromises and concessions are a part of almost every development application process. One can rarely predict what concessions, or how many, may be required of an applicant. One rule of thumb is that the higher the level of review the greater will be the concessions imposed on the project. Therefore, it is generally wise to request more than what the client desires so that compromises can be made.

This requires that the applicant and the lawyer be very clear on exactly what the bottom line is. If the client is an oil company seeking to open a service station, selling gasoline will likely be more important than selling beer and wine, so a city's request to change the number of shelves in a convenience store at a gas station will be more acceptable than reducing the number of gasoline pumps. If the nonnegotiable objectives are communicated to the agency early and often, it is unlikely that the client will be surprised with deal-breaking demands when the

process comes to its conclusion.

This also gives a client opportunities to show flexibility and reasonableness by making agreeable concessions as they arise. For example, an unusual demand from a South Bay city planner that a developer grant a separate utility easement to the city for "uninvented technologies" was honored, since the easement was limited to existing conduits and therefore effectively no more burdensome than easements already granted.

The Land-Use Attorney in Action

After developing a clear strategy, it is time to implement the plan. The land-use attorney's first objective is to disarm any potential weapons that might be used against the project. The attorney should take an eager, proactive role in assisting staff with drafting documents, reviewing and commenting upon those that are drafted, and acting as a liaison between the governmental agency and the development team. The attorney thus not only assists the agency that is making the decision but also helps to moderate the conditions on the project and shape the ultimate approval.

Even small projects require findings on the environmental review, findings pursuant to local requirements, and resolutions. Later challenges to a project approval will be reviewed entirely upon the administrative record compiled during the approval process. The practitioner must ensure that the record is as complete and favorable to the client as possible. An attorney can supply needed input and draft language for findings and resolutions as well for an Environmental Impact Report, responses to comments on the EIR,²⁶ a Statement of Overriding Considerations,²⁷ and a Mitigation Monitoring Plan.²⁸ An attorney can even draft at least portions of the conditions of approval and the staff report. In some cases, drafts of any of these documents can be included as attachments to a project application. Even when others have prepared these documents, an attorney can shore up any weaknesses arising from the CEQA process—by drafting findings, for example, on how recent project revisions have not significantly increased the environmental impact of the project.

Opportunities to assist can be sought everywhere. Helping a city attorney work through a controversial legal issue can be of immense benefit. Experienced land-use counsel have drafted memorandums of law and indemnity agreements that shift the burden of risk from a city to the applicant so that, for example, the applicant could proceed with demolition of a warehouse prior to the expiration of the appeal period for the full project approval. Every act of helpfulness to staff is

one less point of opposition to overcome later. Just as important, where appropriate, the attorney's letter or memorandum can be later cited as evidence in the record that supports an agency's decision.

Working with Decision Makers

Ultimately, of course, the time will come when a proposal will be presented to decision makers. An important tactic that even the most sophisticated clients often overlook is contacting those decision makers prior to a hearing to listen to their concerns, answer their questions, or generally inform them about the project.

Every jurisdiction has its own rules and customs regarding meetings with its elected and appointed officials and their freedom to investigate a development site.²⁹ Yet such contact is not only entirely appropriate, it is often welcomed, and no law (including the Brown Act) prohibits an applicant from meeting with a decision maker. A project applicant, especially a property owner, is well advised to arrange for a personal tour of the property by each decision maker. Indeed, it is almost impossible to imagine a governmental body making decisions affecting real property without its members having first investigated the site. Even a full governmental body tour can be arranged, consistent with the Brown Act, so long as the hearing is noticed and open to the public. All members of the governing body can meet at the site at the same time, ask questions, and investigate conditions.

Above all, the effective land-use practitioner understands the value of patience. Unexpected delays in the development process should be expected. The skilled practitioner knows how to turn delays into opportunities for action.

For projects involving EIRs, delay means more time for public review of the EIR. Sometimes the public review period is extended. Sometimes the delay results from the recirculation of an EIR,³⁰ a situation often feared by a project applicant because it means that significant new information has required an additional public review period, not only resulting in additional delay but also potentially requiring additional expense for new mitigation measures. But whatever the downside, if an approved project is ever legally challenged, courts will invariably cite the additional time granted for EIR review as evidence of an agency's good faith and receptiveness to public comment.

In the meantime, the attorney can use the additional time to lobby staff and decision makers on key issues, explore project alternatives and mitigation, fine-tune findings and responses to comments, agree on ways to

present project revisions, and solidify public support for the project. It is not unusual for a delay, which appears troubling at first, to offer new opportunities: to allow senior company officials sufficient time to arrange to fly into town for a public hearing and personally demonstrate their commitment, to permit a planning director to rearrange his or her schedule to make the project presentation personally, or to provide an opportunity for the client to meet with wavering planning commissioners and dissolve all doubts.

The Exit Strategy

Even the finest practitioners know they cannot win every battle, and so they prepare a contingency plan. An important tactic to consider when a project is doomed to defeat is to seek a continuance, thus avoiding a formal denial.

The downsides to a denial are obvious. A public body has taken a formal, public action against the client. It becomes public knowledge and may be reported in the newspapers. Those who oppose the project will claim vindication. It is a blow to the client's ego, and could reflect poorly on all involved in the project. The only alternative is to appeal.

An additional, practical downside is that in many jurisdictions the municipal code prohibits the refile of an application for a specified period of time, such as 12 months after a denial.³¹ A client could not, therefore, bring a modified project back to the governing body for a full year.

From the perspective of the public agency and the project opponents, a continuance effects the same purpose as a denial. The project, in either case, does not move forward. But a continuance has the added advantage of arousing little controversy. No constituents are alienated by a divisive vote one way or another. For that reason, most governing bodies will look favorably on a continuance request.

Sometimes the practitioner will realize long before the public hearing that the project does not have sufficient support, but frequently this fact will become evident only later, during the deliberations on the project. The attorney and client should agree in advance on a strategy if it becomes apparent—perhaps even in the minutes just prior to a vote—that the project will not be approved. (Remember that if one member of a 5-member panel is absent or abstains, a 2-2 vote constitutes a denial.) One strategy in the face of a last-minute denial is to prepare a decision maker who supports the project to move for a continuance before a vote is taken. If such preparation is not made, the practitioner may have to take more dramatic action by leaping out of the audience and to the

podium—even if the public hearing is closed—to request a continuance.

For the client, a continuance provides an opportunity to reassess objectives, communicate with members of the opposing side, and revise the project. It allows for cooler heads, on all sides, to prevail.

Today's breed of Roninlike practitioners seeking land use approvals must rely on that most concealed of contemporary weapons: cunning. They require a fair-minded attitude, a well-conceived strategy, masterful diplomacy, and artful use of time. Rarely is it necessary for the skillful Ronin to unsheathe the sword of litigation; it is a weapon to be seen, not used. Armed with wisdom and good temper, the Ronin is willing and prepared to serve several masters faithfully, to the greater prosperity of all. ■

¹ See, e.g., DANIEL CURTIN, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW (18th ed. 1998); JAMES LONGTIN, LONGTIN'S CALIFORNIA LAND USE (2nd ed. 1987) (plus supplement); WILLIAM FULTON, GUIDE TO CALIFORNIA PLANNING (1991). An excellent layperson's summary of land-use law can be found in LEAGUE OF CALIFORNIA CITIES, PLANNING COMMISSIONER'S HANDBOOK (1995).

² GOV'T CODE §§65100 *et seq.*

³ GOV'T CODE §§65300 *et seq.*

⁴ GOV'T CODE §§65800 *et seq.*

⁵ The Subdivision Map Act (codified at GOV'T CODE §§66410 *et seq.*).

⁶ GOV'T CODE §§65864 *et seq.*

⁷ The California Coastal Act of 1976 (codified at PUB. RES. CODE §§30000 *et seq.*).

⁸ California Community Redevelopment Law (codified at HEALTH & SAFETY CODE §33000 *et seq.*).

⁹ California Environmental Quality Act (codified at PUB. RES. CODE §§21000 *et seq.*).

¹⁰ CAL. CODE REGS. tit. 14, §§15000 *et seq.*

¹¹ Ralph M. Brown Act (codified at GOV'T CODE §§54950 *et seq.*).

¹² Permit Streamlining Act (codified at GOV'T CODE §§65920).

¹³ PUB. RES. CODE §21002.1(a).

¹⁴ PUB. RES. CODE §21002.1.

¹⁵ CAL. CODE REGS. tit. 14, §15002.

¹⁶ GOV'T CODE §54953.

¹⁷ GOV'T CODE §54952.2(b).

¹⁸ GOV'T CODE §54952.2(c)(1).

¹⁹ GOV'T CODE §65950.

²⁰ See, e.g., CAL. CODE REGS. tit. 14, §§15100-12.

²¹ GOV'T CODE §65956.

²² For example, the application must include a statement that it is an application for a development permit. GOV'T CODE §65943(a).

²³ MARSHALL McLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MESSAGE (1967).

²⁴ See, for example, CITY OF COMMERCE MUNI. CODE §19.05.010(7).

²⁵ GOV'T CODE §66412(d).

²⁶ CAL. CODE REGS. tit. 14, §15088.

²⁷ CAL. CODE REGS. tit. 14, §15093.

²⁸ PUB. RES. CODE §21081.6; CAL. CODE REGS. tit. 14, §15091(d).

²⁹ A representative example of local lobbyist and municipal advocate ordinances can be found in L.A. MUNI. CODE §48.02.

³⁰ CAL. CODE REGS. tit. 14, §15088.5.

³¹ See, for example, CITY OF COMMERCE MUNI. CODE §19.04.042(a).