

Winning the Land Use Case<sup>1</sup>  
“The harder your work, the luckier you get.”

## **I. In the Beginning**

Sometimes we are lucky and get to see a project through from formulation of the application to decision. However, the authors’ experience is that lawyers are rarely brought in to a land use matter when the development project is a twinkle in a developer’s eye. Similarly, our experience is that opponents are prone to bringing in their lawyers late in the application process on the misguided idea that this saves them money and that they could do the work themselves, or because the client came into the process late in the game himself. Moreover, when we have served government clients, we’ve noticed that the public lawyer often hears about problematic projects only after serious problems have arisen, and sometimes even after staff (or elected officials) may have taken indefensible, or unhappily, high-profile positions. Consequently, the job of the lawyer to “win” a land use case is a varied one indeed. It can involve writing a really good story to capture the imagination and enthusiasm of decision-makers. It can also be like emergency medicine – triaging the most critical injuries in your case before you even get to start. Regardless of the stage, we all want to “win” for our clients and do the best job possible. While opportunities to influence the outcome change based on the status of a matter and how bad off the situation is when we arrive (damage done or work omitted), there are some basic rules that make it more likely the lawyer will do a good job and have a shot at winning. Most of these things happen in the beginning and are summarized below.

- You will work very hard. To win you must outwork your opponents and the decision-maker.

There is no substitute for hard work to win a land use case. Clients who don’t want to pay for the attorney to understand the details of a project are clients to avoid. They will never be happy. They will forget your role was limited. They will not speak kindly about you to others. They may not pay you. Work that you did for the client early on in the course of representation that pleased the client may no longer be looked at so kindly as the land use case becomes protracted.

- You must understand the matter.

It is critical to understand the matter thoroughly. Assuming is dangerous; this includes you as the attorney arriving at conclusions based on transition advice from an earlier attorney whom you may be replacing (and who likely failed). It is easy to view land use matters myopically. It is not a matter of making friends with opponents or government staffers and assuming what they tell you is so. It is a matter of maintaining a professional focus on moving your client to the goal, even when an attorney represents a government entity. Too many times attorneys fall into the trap of thinking if they only talk to this person or get to that person that their client’s objectives will prevail. In reality, attorneys who win land use cases do so because

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they knew their cases and worked them wisely – which may include making friends. But in the end, professional adherence to the idea of hard work is how these cases are won.

The development or opponent team may portray a “project mythology” that bears little resemblance to the legal construct in which the project actually exists. The client probably understands the basic nature of the matter or problem, i.e., what was applied for and what he likes or doesn’t like that has happened to him in the application process. However, a client’s sense of the legal parameters (and often the consultant’s sense of the same) of a project is often wholly inaccurate, misleading or incomplete. Hence the attorney must gain her own understanding of the following and then teach it to the team:

1. Deadlines: When is the next one? Is it a hearing, or an imminent appeal?
2. The specific legal standards that apply: is the matter a plan amendment where the goals apply? Land use decision where the plan does not likely apply?
3. Whether the matter is a response to a state order or requirement, such as a work task in periodic review;
4. The type of case (quasi-judicial or legislative) and why it matters;
5. The status of the matter (has a final appealable decision been reached on some topic relevant to the issue);
6. Whether the record is open or closed or closing fast;
7. Whether evidence on all relevant standards is in the record (both for and against your key positions); if your matter involves ambiguous local plan and code provisions, is there local legislative history that might be helpful on appeal, which you must get into the local record in order to use on appeal at LUBA or beyond;
8. What staff letters or staff reports say;
9. What do the key cases say about your situation? Is there any recent case law about your situation? Do a quick “find” on LUBA’s and the court of appeals’ website at a minimum;
10. Are there cases from your jurisdiction that might bear on your matter?
11. Check the local government decision-maker’s website. Are there decisions on similar applications from the planning staff, planning commission, hearings officer or an elected decision-maker?
12. If you have an ODOT issue, check ODOT’s website to see if there are any reports or documents on issues similar to that you’ve been asked to tackle, or even on the very matter you are asked to work on;
13. Your client as villain – what does the media or internet have to say about your client and your client(s) project or positions?

It is only after the attorney has a clear understanding of these matters that she can go on to prepare and present a strong, winnable case.

- Define a Win

The attorney must clearly understand the client's definition of what the "win" would be in the first place and what it is worth to him. As part of that process, define what the client would view as a spectacular defeat. This is the envelope within which the art of managing client expectations is practiced. Document the client's goals and if those goals change as the land use case progresses, document such changes. Often, as land use cases progress, changes to the application are necessary and such may necessitate the evolution of your client's goals. Never presume to know whether a case is controversial or complex.

Passive aggressiveness is an epidemic disease in land use cases. It is easy to be lulled into the sense that staff likes you and your position and that opposing ideas either don't exist or no one believes them. Is the case controversial or not? Is it relatively simple or complex? These labels can change quickly, leaving little time to adjust. It's better to be thorough than to be surprised by an adverse staff recommendation you did not see coming.

On the other hand, opponents can become allies. For example, it is unwise to presume a nearby neighborhood will oppose a project. Much can be accomplished in a pre-filing neighborhood meeting, making project adjustments to respond to concerns, especially if neighbors see that the project isn't cast in stone and their comments will be considered / incorporated before filing the application.

- Do you have leverage?

Enough said.

- Know When to Hold 'Em

Both developers and opponents have secrets. Know the ones that you are supposed to keep. Understand that communications with persons who are not the client or a part of the attorney's work product can be discoverable. Remember that communications by and between government actors are public records. And be conscious of the fact that the attorney-client privilege protects those communications involving the client and attorney, and no others (unless other specific hoops are jumped through that are well beyond the scope of this paper).

- The Right People on the Bus

In our collective experience, the representations most likely lead to a "win" are those where the attorney plays the role of quarterback. The attorney is in control of what happens; how it happens; and importantly, outside communications. The formula for success begins with the consultant/expert team being managed by the attorney. There is a risk of dismal failure when consultants or experts take control. In our experience, they often do not understand the legal or policy floor, or make terrible blunders ahead of the team strategy and then blame others. When consultants are driving the bus before the attorney gets the wheel, they often take wrong directions from staff – filing applications that are not needed, or taking a wrong turn in the application process because they want to please staff or they think that staff knows the law.

The importance of hiring the right consultants and experts cannot be underestimated. Whether the attorney represents the proponent of a development proposal, opponents of a

development proposal, or a governmental entity involved in considering an application for development, s/he will run into approval standards that call for expert analysis and opinion. An expert is needed because a lawyer is unlikely to find it appropriate, possible or smart to develop and supply evidence in a quasi-judicial land use proceeding to show compliance with critical approval standards or avoid unreasonable conditions of approval. In short, you probably don't know enough and even if you do, you're considered biased. However, an accredited expert is generally considered objective and knowledgeable. The typical consultant is the planner. The most frequently necessary expert is the transportation engineer, so we will focus on that expert's role in the examples to follow. Other experts you might need depending on the case are:

- Civil Engineer
- Architect
- Wetland Delineator
- Biologist
- Habitat Restoration Specialist
- Geologist
- Mining Expert
- Hydrologist(s)
- Groundwater Specialist
- Stormwater Management Expert
- Hazardous Materials Specialists
- Archaeologist
- Historian
- Preservation Specialist
- Restoration Specialist
- Noise Specialist
- Air Quality Specialist
- Greenhouse Gas Analyst
- Design Guideline Specialist
- Traffic Specialist
- Water Quality Analyst
- Visual Analyst
- Fire Behavior Analyst
- Fire Protection Specialist
- Lobbyists
- Public Relations Experts
- Pollsters
- Advertising Experts
- Neighborhood Outreach
- Financial Analyst
- Public Finance Experts

As noted, one of the most common types of experts a developer must hire is a traffic engineer. Similarly, opponents will often hire their own traffic engineer to provide an independent analysis of the developer's reports, and the local government will usually have a transportation engineer on staff capable of analyzing development proposals and opponent

evidence. Careful lawyers understand that it is virtually impossible for a development proposal to establish compliance with discretionary approval standards regarding adequacy of transportation facilities or access management without the assistance of a transportation engineer.

Even smaller projects that do not by code require a Traffic Impact Analysis (“TIA”), call for an expert. After all, only an expert can opine regarding whether the project is small enough to fall below the trip-generation threshold in applicable codes for requiring a TIA or other thresholds. Further, an expert is needed to help decide whether under the Transportation Planning Rule (“TPR”) a project has a “significant effect” on a transportation facility. In determining whether a plan or land use regulation amendment will “significantly affect a transportation facility” to trigger more sophisticated reviews, there can be disputes about the decimal places that supply the trigger. Specifically, there have been litigated disputes about whether the “before and after” volume to capacity (v/c) ratio can be computed to two decimal places rather than to three decimal places. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006). Suffice to say a transportation expert is a valuable asset to have on hand for almost any project.

Traffic engineers are smart people with an important skill set crucial to the development process. However, they are also notoriously bad witnesses; they have a keen sense of the minutia and do not easily “show” their work in the first draft of a TIA. Bringing out the best in your transportation engineer expert requires the attorney to work with the traffic engineer and have a basic understanding of (1) the traffic engineer’s language, (2) the tools s/he uses to conduct an analysis and write a report, and (3) the standards by which s/he is asked to evaluate a proposal’s compliance. Regarding the latter, an attorney should zealously guard her role on the team as the team member responsible to identify applicable standards, how they apply and what they mean. After all, a lawyer understands the difference between an aspirational “guideline” and a “mandatory approval standard.” To your expert, they may have all the same level of significance.

With regard to any of the experts, it is useful to find an expert familiar with the applicable standards, one who will ask questions and make suggestions. The lawyer’s role is to instruct the expert clearly, and the expert’s role is to perform within the designated scope. Surprises in the context of transportation analyses are very expensive and often prove fatal – it is nearly impossible to un-ring a transportation analysis bell. In order to instruct the expert well, an attorney must have basic understanding of what her expert does.

It’s sometimes tempting to hire an expert already familiar with a particular intersection or geographic area. Be careful. That expert may have bias or preconceived notions that outweigh the value (cost savings) of the already-acquired knowledge.

In hiring an expert, the attorney must have a clear sense of the “bad guys” – the individuals and entities on the other side or likely to be on the other side. Firms are as hungry as anyone and may well receive a significant portion of their work from the governmental agency or group or opponent that is either currently or is likely to be adverse to your project. This means an engineering firm, a title company or an environmental cleanup firm, for example, may have irresistible temptation to cave in to demands that they do not otherwise agree with, which may result in flood or transportation models and studies that are deleterious to your client’s interests.

- Winning teamwork requires team ground rules.

Once the consultant team is selected, or once you are brought in to work on a project, it is important to have an initial meeting that includes the client and key consultants. The client should be briefed ahead of time to put the client's imprimatur in the pecking order, including the importance of the attorney being in charge. The point of the meeting is to reinforce or develop (depending on project status) the project goals, scope, chain of command, roles, protocols and basic timelines. Necessary protocols include processes for vetting documents before they go outside the team as well as the process for maintaining attorney-client privilege, among others. At this meeting the scope of work and timeline should be discussed with as much precision as possible, and all members of the team must buy in.

- Understand basic consultant/engineer speak.

Experts' vocabularies are not ours, and they throw around acronyms that can make a bang-up report boring or useless. A universal problem is TIAs. Transportation terms are universally complex. You need to understand what each of them generally means. You cannot evaluate the adequacy of a consultant's report, especially a TIA, without basic understanding of what the TIA says and what the words used mean. (A glossary of some basic transportation terms is included at the end of this paper because they are so ubiquitous and troublesome.) In the beginning and throughout the project, as important terms come to the attorney's attention, the attorney should consult the local codes as well as state statutes, administrative rules and state agency published "guides" to see if there are particular key definitions that apply. There may be local, regional or state differences.

- Understand the standards that apply and be the one to interpret and apply them.

The attorney must identify real and perceived ambiguities in the applicable standards. Planners can be helpful in identifying applicable standards and even what they mean. But the planner's analysis must be only the "first cut." It is no substitute for the attorney's analysis. Planners as a group have a poor sense of distinguishing standards that may not apply to the particular kind of decision, are or are not phrased in mandatory terms, must be considered but are not binding, or are mandatory standards that require a finding of compliance. Planners who resist direction have no place on the team.

It is also a good idea to ask your expert whether s/he is aware of any local or state "guidelines" that will bear on key terms. Sometimes the local or state agencies supply informal guidelines that consultants (wetlands, transportation experts, etc.) are tasked by a state agency to apply, but your expert does not necessarily disclose to you that such guidelines are being applied in his/her analyses. Your expert may not understand that you as the attorney need to know of such agency requests. These agency requests can lead to damaging results in the resulting expert report that are unwarranted by the applicable legal standards or even by sound practices in the particular profession. The attorney should research to determine whether standards or guidelines have been previously interpreted locally or in the state and how they have been applied in the past by the applicable decision-maker. Relatedly, the attorney should ask the expert how s/he has applied the standard in the past.

Once the attorney decides on the standards that apply and the best interpretation of the applicable standards and guidelines, it is important to consider whether it makes sense to run that interpretation by the decision-maker's attorney. This helps to identify disputes about how

standards apply early, and it may be possible to resolve concerns before they blossom into litigation. Some jurisdictions have code provisions that allow for formal interpretations of code provisions. See, e.g., Eugene Code EC 9.0040 (Director Interpretation). Sometimes, decision-maker's counsel will not have considered a standard in the light in which you see it. They may well agree with you. It is often better to attempt to gain that agreement before contrary positions harden. Give them a chance to think about your reasoning beforehand, in private. It's far more difficult for people to retreat from opinions and interpretations put in writing or stated in a public forum than it is to adjust before being perceived as committed. Where the standards are unclear, consider drafting a written interpretation that the government attorney agrees with that can be specifically adopted as a part of the decision. Otherwise, the attorney flirts with a remand on the basis that the review authority is unable to review the interpretation or understand the assumptions regarding how the standards apply and what they mean. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

In many cases, the applicable code for transportation adequacy standards will allow the transportation expert to presume that the traffic potentially generated in the existing zone (from vacant property) or from the existing development on the property is part of the "background" or ambient situation that need not be mitigated. Typically, mitigation is triggered when a project changes the number or types of trips anticipated or actually generated at a particular site. Thus, for example, in *Sierra Club v. City of Orange*, 78 Cal. Rptr 3d 1 (2008), the court determined it was appropriate to include as part of the baseline of trips those trips that were associated with an approved-but-never-built project for the subject property.

On the other hand, the rationale for not supplying mitigation must be stated with reference to the applicable standards. In *Woodward Park Homeowner's Assoc. Inc., v. City of Fresno*, 58 Cal Rptr 3d 102, 137 (2007), the court remanded a decision that failed to apply mitigation based on a long running inter-agency spat:

Simply stated: The city's practice is illegal. There is no foundation for the idea that the city can refuse to require mitigation of an impact solely because another agency did not provide information. The seed of the city's confusion, as evidenced in the city staff report to the planning commission and city council, is its belief that the city needs to require mitigation of this category of impacts only if Caltrans proposes a mitigation measure and then proves to the city's satisfaction that the measure is legal. This is not how CEQA works. When the city identifies an impact of a project, CEQA gives it only four choices: (1) to find, based on substantial evidence, that the impact is insignificant; (2) to find, based on substantial evidence, that although the impact is significant, no mitigation is feasible and the project is justified by overriding considerations in spite of this; (3) to require a mitigation measure and find, based on substantial evidence, that the mitigation measure renders the impact insignificant; or (4) to find that mitigation measures are within another agency's responsibility and that the other agency has adopted them or can and should do so. Caltrans' behavior does not create a fifth option.

Concurrency standards will create their own set of issues. These standards usually require that at the time of occupancy, the identified impacts from the proposed development will be sufficiently mitigated to meet applicable design and capacity standards. Sometimes the

applicable code will find concurrency is met if needed facilities either exist, or are planned and funded in a Capital Improvement Plan (“CIP”) or other mechanism. It is important to read the applicable concurrency standard carefully. Sometimes concurrency is forgiven altogether where mitigation is not within developer’s control (another jurisdiction has responsibility) or infeasible. See *Woodward Park Homeowner’s Assoc. Inc. v. City of Fresno*, 58 Cal. Rptr.3d 102 (2007); see also *D.R. Horton Inc. – Jacksonville v. Peyton*, 959 So.2d 390 (2007).

Another problematic type of standard in the transportation context, is the “trip cap.” Trip caps often supply a certain amount of trips allowed for a given segment of a transportation facility in order to maintain capacity. When the caps are met or exceeded, no more development approvals will be provided unless further mitigation is supplied to create additional capacity. Such further mitigation is often extremely expensive. Moreover, trip caps don’t necessarily guarantee approval for development proposals that are within the cap. For example, in *Rochow v. Maryland Nat. Capital Park and Planning Com’n*, 827 A.2d 927 (2003), the court determined that where a trip cap standard did not provide otherwise, trip caps do not give carte blanche rights to development approval for proposals that are within the cap. The court stated that the approval authority was within its discretion to deny a development proposal that “reconfigures” a plan even where the reconfiguration proposal generated trips within the trip cap.

- Take steps you can to avoid the decision-maker or important members of the community from taking a premature position one way or the other.

If someone matters to the application or to the opposition of the application, or to a governmental client’s agenda regarding an application, then it’s wise to do your best to avoid them taking any publicly adverse positions. Once a high-profile person takes a position it’s really tough to back him out of it. For example, if an application needs to be withdrawn in order to start over, sometimes it is worth it. This shows the important person that the applicant cares and wants to “do the right thing,” which may avoid a publicly adversarial position. This strategy changes from project to project, but it’s best to avoid being seen as “railroading.”

- Look at the public body file on the property.

Most public bodies will allow any person to view a planning file for a particular property. Some governmental agencies require the advance filing of a public records request to do so. Regardless of what you have to do, it is important to review the planning file for the property so as the attorney you know (a) if the property has a “past,” and (b) whether there are key facts or previous decisions affecting the property that will affect how you prepare and present your case.

## **II. Once You are Rolling**

- Have a plan of action.

Develop and stick to a strategy plan on subsequent events, but remain flexible to adjust as necessary. As the attorney, you decide what is necessary and when. Specific team members should have specific jobs with specific deadlines to respond. Understand that while consultants are important, and they are the attorney or client’s employees, they may have agendas of their own. Confidential details of a project should not be shared except on a need-to-know basis.

Members of your team can be well intentioned but careless; be careful what is distributed to the team about the plan if there are details that you don't want on the front page of the newspaper.

Expect your team to stay on task and adhere to the plan. Be sure your client(s) is invested in the plan. You may need him to help you push others to stay on task and on time.

- Stay current.

The attorney must maintain an understanding of relevant standards and guidelines prepared by the affected local, regional and/or state agency. These may or may not be published. Obviously, the TIA must be based on the applicable state and local requirements. There is no excuse for an attorney not to understand consultant reports and how they establish evidence of compliance (or lack thereof) with applicable standards. For example, understanding your expert's TIA demands that the attorney understand the timeframe for the applicable traffic counts. Were the timeframes representative? Was something unusual going on at the time of the counts? Was school out because it was summer? Does it matter? For example, in *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006), it was determined that collecting traffic data at a time when the university is not in session invalidates the traffic counts in a city with 8,000 people, where 5,000 of those people are students at a local university.

Periodically check the governmental website to determine if positions have been taken on matters relevant to the project you are proposing or opposing. Stay current on LUBA and court of appeals cases. Keep up with local government decisions that interpret relevant portions of local code. You never know when something in an opinion helps or hurts the work you are doing.

- Manage the team's deliverables.

Understand what your consultants are working on and whether they are having any particular difficulty with an assignment. If you can, read draft reports before they are final. Going into a consultant's report, understand the parameters. For example, understand the reason for a traffic engineer to pick the particular intersections to be analyzed in the TIA and the reason others were rejected. Understand the timeframe for the TIA horizon, whether the traffic counts are stale or taken within the timeframe authorized by the applicable standards and guidelines. Concerning the latter, traffic counts can be stale within any period of time. The authors are familiar with standards making data stale two years after it is collected. (Although it is also the case that so long as the counts are placed into a TIA within two years that might be enough, but it is wise to consult applicable local and state standards.)

Another place for lawyers to win or lose is with consultant models. Models, particularly transportation models, should be calibrated to existing conditions and then project traffic conditions from there. Inputs for existing conditions and growth rates are important and are required to be correct. Further, sometimes the inputs can be required by local code, as is often the case for growth rates. Failing to apply correct inputs for modeling is a fertile source of litigation. However, the absence of a calibration is not necessarily fatal if there are other ways to adjust the model and attest to its accuracy. An example of this is if calibration cannot be achieved because, for instance, key intersections are under construction. In *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 34-36 (2007), the Oregon Land Use Board of Appeals determined an un-calibrated Sim Traffic Model was substantial evidence to support a development proposal:

[T]he opponents' traffic expert testified that calibration is necessary to ensure reliability. Wal-Mart traffic experts and city engineer staff disagreed, testifying that the SimTraffic model is reliable notwithstanding the lack of calibration, due to its "conservative" inputs. That dispute between experts over how to determine the reliability of the model, and whether the model is sufficiently accurate to make it reasonable to rely on the model to predict present and future traffic conditions, is a highly technical issue. As far as we can tell, that issue is not controlled by any city code provision or other authority, including the FHWA Traffic Analysis Toolbox Guidelines. While the FHWA guidelines certainly stress the importance of calibrating the model to verify its accuracy in predicting future conditions, the guidelines do not state that calibration is the *only* way to ensure that the model is sufficiently accurate, if for some reason calibration data cannot be obtained. The hearings officer chose to resolve this difference of expert opinion by relying on the testimony of Wal-Mart's expert and the city staff.

In the petition for review, the neighborhoods critique that testimony, and argue that reliance on analysis of "saturation flow" and "lane utilization" is not sufficient to ensure the reliability of the SimTraffic model, in the absence of calibration. However, as Wal-Mart points out, the neighborhoods do not cite to any expert testimony or other evidence in the record to support that critique, and it apparently consists only of the arguments of the neighborhoods' attorney. Nothing cited to us in the record directly contradicts the testimony quoted in n 7 that using the identified conservative inputs is sufficient to ensure that the model "is an accurate predictor of future conditions." Record 1261.

The neighborhoods further challenge the hearings officer's reliance on the "independent expertise" of city engineer staff, citing staff statements that staff are "not that sophisticated" about traffic simulations. However, the cited statements certainly fall short of establishing that city engineering staff are not competent to testify on the reliability of the SimTraffic model absent calibration. The hearings officer did not err in relying in part on the testimony of city engineering staff, or in giving weight to staff's "independent" testimony. See *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277 (2006) (a local decision maker may assign additional significance to the testimony of city or state engineers based on their neutrality regarding the development proposal). (Footnotes omitted.)

If the attorney fails to understand an expert's report, and especially if the project approval or denial is appealed, the attorney can inadvertently discredit the expert and risk the project. See *Valley Properties, Inc. v. Pinnacle Partners, Inc.*, (unreported) 2006 WL 51362 (2006) (Mass.) (developer's attorney understood that only one intersection required mitigation and that was the focus of his case; but his transportation expert testified that there may well be another intersection that requires mitigation.)

- Keep an eye on mitigation measures your consultants or government staffs may be proposing.

The attorney for developers must be especially vigilant to understand the mitigation that is recommended or offered in a consultant report or the staff report, as well as its feasibility and likely cost. Be sure your client understands these too. There is no win if the project approved for a developer client is one that can never be developed because of hopelessly expensive mitigation costs. Especially be wary of infrastructure conditions of approval. Be sure you are comfortable that the recommended mitigation is fair as a policy matter to lie at your client's door. Both *Dolan*<sup>2</sup> and *Nollan*<sup>3</sup> are especially important in the context of mitigation conditions because mitigation can be disproportionate and expensive. Where the governmental approval authority's staff recommend conditions of approval, your expert can be very helpful to the attorney to evaluate whether the conditions are supported by applicable standards and relevant evidence and meet *Nollan* and *Dolan* as well as any specific state tests.

The attorney should understand that the recommended mitigation in the TIA will become the conditions of approval for the project. In most jurisdictions, conditions of approval must have a basis in a TIA and cannot be imposed simply because they seem like a good idea; rather, they must relate to a specific impact of the proposed project. *Citizens for Responsible Dev. v. City of Spokane*, 137 Wash App 1026 (unreported in Pacific Reporter) 2007 WL 589722 citing *United Development Corp. v. City of Mill Creek* 106 Wn.App. 681, 26 P.3d 943 (2001). In Washington State, a government cannot force a developer to provide transportation improvements to solve existing deficiencies. *DeTray v. City of Lacey*, (unreported) 2006 WL 701938; *Benchmark Land Co. v. City of Battle Ground*, 146 Wash.2d 685, 694, 49 P.3d 860 (2002). Amendments are being proposed to the Oregon TPR by LCDC as a result of the 2011 Legislative Session that may lessen the potential for developers being required to provide mitigation for situations where the problem is an existing deficiency. Attorneys should pay attention to these amendments. They are evolving as these materials are written, with the public review draft of October 25 under current consideration, subject to public hearing scheduled for December 8, 9:30 a.m. <http://www.oregon.gov/ODOT/TD/TP/OHP22001.shtml>.

There is parallel work being done to the Oregon Highway Plan by the OTC. That hearing was to have been held on November 16, and OTC action is expected December 21 at the OTC meeting in Salem. See <http://www.oregon.gov/ODOT/TD/TP/OHP2011.shtml>.

However, the line between appropriate and inappropriate mitigation conditions of approval is nearly always blurry, and the expert is the necessary evidentiary link to show a floated or proposed condition would be unlawful as overbroad or lacks the required constitutional connection. In any case, most jurisdictions agree that the approval authority can ask a developer to bear only those burdens of public improvements that demonstrate a reasonable relationship to the actual impacts of the proposed development. See *McClure v. Springfield*, 175 Or App 425 (2001). Do keep in mind that inadequate facilities can lead to denial. In Oregon, an administrative tribunal determined that a local government errs in relying on conceptual highway improvements for which there is no funding mechanism in place or evidence that needed improvements are reasonably likely to be provided by the end of the

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<sup>2</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>3</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

planning period to determine that a particular project does not itself cause a “significant effect” on a transportation facility. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

- Understand the process.

The attorney must understand the process and convey that understanding to the team. The attorney must take care to know how much time will be available for the hearing presentation. The team must rehearse the presentation to assure that it fits within the allotted time and is, most importantly, persuasive and relevant. Moreover, it is critical to know how far in advance of the hearing the application materials must be available and then to make those materials available within the deadline. However, understand that submittal deadlines are often non-mandatory and opponents in particular often benefit from late submissions. Delay is the enemy of development. Time is money.

If possible, piles of paper introduced into the record at the last minute are best avoided. They can be used for opponent’s benefit, if the *pro se* card “just folks” can be played. For the development side, where the land use approval process provides only a short time to respond to adverse allegations and evidence, presentation of evidence on the evening of the hearing is unavoidable. In such a circumstance, it would likely be malpractice not to submit the responsive material. Hearings officers, who often feel political pressure from elected officials or governmental staffs, may look for a failure of development-side evidence on some discrete issue. The team leader is smart to put himself in the hearings officer’s shoes and determine if there is any adverse point that has not been adequately addressed. If there is adverse testimony that has not been adequately answered, the team should not be shy to answer it, even if that means the answer will be submitted at the hearing due to time constraints, or afterwards during an open record period.

Have a good grasp of the local decision and appeal processes. You will be surprised at the poor grasp of these essentials that your opponent and his/her consultants have as they enter the local application process. Are there mandatory pre-application steps, such as a neighborhood meeting or a meeting with staff? When the application is filed, how will the staff conduct the completeness review? Are the extensions that this staff routinely tries to extract from an applicant in compliance with state law? Who makes the first decision? With or without a public hearing? To whom is the local appeal? What is the deadline for the appeal? Will the appeal allow for new evidence? Who makes the final local decision? Is the applicant aware of her circuit court rights if the local government does not make a final local decision within the 120-day statutory deadline? Is this the kind of application (say, one with highly discretionary standards) where it is very important to preserve the circuit court mandamus option, which means being stingy on local extensions? At the start of the process, you should inform the applicant and the team of the process issues as they relate to this kind of application.

- Respond to Relevant Issues Raised at the Hearing.

It is an established land use rule that if an opponent raises a relevant issue at a hearing with evidence or argument, there must be a response to it or the argument, and consequently the case, may be lost. Attorneys are best suited to know when this happens and to be able to identify the kind of response that is required. Also, attorneys have the best handle on the available time

allowed for a response and must be sure that a timely response makes its way into the record. It will invariably be necessary to supplement consultant reports in order to respond to relevant issues and evidence presented by opposing experts or governmental entities. If the required report is not updated to respond to issues that arise, then the project risks denial by local review authority or reversal by appellate court. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 280-81 (2006) (TIA).

- Pay attention to the Local Record.

The applicant carries the burden to show that every applicable standard is met for a project to be approved. This burden remains on the applicant throughout the local appeal process. *Sunnyside Neighborhood v. Clackamas County*, 280 Or 3, 18, 509 P2d 1063 (1977). There must be findings of compliance with relevant standards and evidence in support those findings. Here is where the attorney is the key to winning or losing. Attorneys are uniquely capable of knowing when these tests are met or whether there is need for additional legal interpretive work or evidence. Speculative testimony is not evidence. Know the difference. Some examples of evidentiary issues and how they played out on appeal:

- *In Barbara Chilla v. City of North Bend*, 39 Or LUBA 121 (2000), at issue was whether the ITE Trip Generation “Bible” itself needed to be placed into the record in order to be relied upon by a local government. LUBA held that it was adequate evidentiary support for a decision relying on ITE Trip Generation numbers to rely on staff summaries of the ITE manual. This is a good thing because the Trip Generation manual is expensive and once it is in the record it is gone for the duration of the case and all appeals. Also, another relevant facet of this case related to trip generation is that the state review agency, LUBA, agreed with the city that its classification of a store, for purposes of assessing trip generation under the ITE manual, need not refer to a land use classification recognized under the zoning code. Rather, it is permissible for a city to simply use an ITE classification or term for trip generation comparison purposes.
- If the mitigation relied on to make the proposal complies with standards per the recommendations in a TIA, be sure those become conditions of approval. A decision that relies on the funding of TIA-recommended conditions but does not actually impose the conditions of approval or require the funding strategy relied on be implemented is subject to reversal or remand. *Nygaard v. City of Warrenton*, 55 Or :IBA 648 (2008).
- On the other hand, where a local government adopts and incorporates the applicant’s TIA, and the TIA includes mitigation measures, there will likely be no error if the decision fails to expressly impose a condition of approval requiring implementation of those mitigation measures. *Jerry Hildenbrand et al v. City of Adair Village*, LUBA No. 2007-094.

These recommendations are not intended to be exhaustive. Rather they are gleaned from recent and/or memorable experiences we’ve encountered, and that consequently changed our practice methods. We hope they will be of value to you as well.