Chapter 40: Legal Action

The purpose of legal action is to convince a final decision-maker to either deny a permit-approval or to grant a permit-approval with conditions implementing your preferred solution. If the permit-approval is granted before your concerns are fully resolved, then legal action may continue in the form of an appeal to the courts.

One of the most frustrating calls I get is from an activist who has spent the past two years raising tens of thousands of dollars for legal action. By the time they call they are drained of funds and energy with little to show for it all, but still they refuse to give up. So we go through possible strategy options. We usually discover at least a couple of options that should have been pursued either in lieu of legal action or in concert. Frequently, these options had about the same probability of success as legal action, though at a far lower cost, but no one did the research needed to identify these options. So litigation was the only strategy pursued.

If you completed the research presented in *Chapter 35: Researching Strategy Options*, you will know which strategy options offer the greatest likelihood of victory. Implementing any of these options is generally easier if you have the assistance of a good attorney. But, as stated in Chapter 35, the need for an attorney varies with respect to the specific permit or approval you focus on.

WHEN TO HIRE A LAWYER

We strongly urge you ***NOT*** to immediately rush out and hire a lawyer the moment you learn of a project threatening your interests. Instead, you should complete the research described in *Chapter 35: Researching Strategy Options*. Without this research you will not know: a) if you need a lawyer, and more importantly, b) what type of lawyer you need; one specializing in land use-zoning matters, environmental law, annexations, etc.

Not all lawyers are equally qualified to practice in the multiple areas of law associated with a typical development project. Additionally, lawyers vary in their ability to implement specific strategy options: litigation, lobbying elected officials to change the law, land preservation, negotiating with applicants, etc. Again, until you've completed the *Chapter 35* research into your strategy options you will not know if you need a lawyer and what expertise to look for when interviewing prospective attorneys. Finally, far too many attorneys will urge you to start spending your limited resources on the next permit-approval to be heard by a decision-making body. This may or may not be the best place to invest your time and money. Again, only by researching ***all*** of your strategy options will you know where and when expenditure of your limited resources buys the greatest likelihood of victory.

If you are uncertain whether you need to hire an attorney or if you feel you need professional help in *Researching Strategy Options* then contact me at 1-800-773-4571 or Rklein@ceds.org

FINDING A GOOD ATTORNEY

Many states and counties have a few attorneys who specialize in representing citizens in land use and zoning cases. Of course, most land use-zoning attorneys work the developer side of the fence and either refuse to represent citizens or do not understand how to maximize the likelihood of success when representing citizens.

The attorneys who specialize in representing citizens recognize that your financial resources are limited, but you probably have a lot of volunteer hours to invest. To minimize expense they will urge you to do as much of the leg-work as possible. For example, they will suggest that you obtain plans and other submittals rather than paying someone in the attorney's office to do this. But most importantly, most citizen specialist attorneys will be very honest with you about your chances of prevailing in your effort to condition or block a permit-approval. Many of these specialist attorneys will also do an initial meeting with citizens free of charge. During this meeting they can assess the strengths and weaknesses of your case, suggest how you can increase your chances of victory, and offer other important advice such as which decision-makers are likely to be influenced by your arguments.

How do you find these citizen specialist attorneys?

First, contact CEDS. Over the past three decades we've compiled a list of more than 130 attorneys practicing throughout the nation who have a good reputation for helping citizens win zoning, land use, and environmental cases. To learn if one of these attorneys is practicing in your area contact us at 1-800-773-4571 or Help@ceds.org. You can also try talking with long time citizen activists in your area or ask for referrals from citizen groups active in your state, such as those listed on the *State By State Resources* page of the CEDS website.

If you are fortunate enough to have several citizen specialist attorneys to choose from then ask around to learn which has been most successful with cases like yours. The better the reputation of your attorney, the more seriously the applicant and others will take you and the greater the likelihood of victory.

I urge you to meet with each attorney to see which impresses you the most. Following are some questions you might ask during the meeting:

1. How many land use-zoning cases have you handled?

2. How many of these cases were on behalf of citizens?

3. What was the outcome of these cases?

4. Would you mind if we contacted your former citizen clients to get a reference on the quality of your work?

5. Have you ever had a case involving the same permit-approval at issue in our case?

6. Have you argued land use cases in both the trial and appellate courts?

7. How many of these cases have you won?

8. Have you ever represented the applicant, their associates, or is there any other potential conflict of interest?

9. What is the minimum amount of legal work you recommend performing at this point and what would this work cost?

10. If funds were not as limited as they are today:

    a. What other legal work would you recommend doing at this point?

    b. How would this work strengthen our position?

    c. What would this additional work cost?

11. In the interests of minimizing expense, ask the attorney what work you could do which might normally be performed by the attorney or their staff?

12. If you completed the research suggested in Chapter 35 under the heading *Linking Regulatory Requirements to Resolution of Your Core Concerns*, then did you conclude that resolution of your concerns is required by applicable laws or that criteria for granting a permit-approval requires resolution of your concerns? If yes, then discuss your conclusions with the attorney. Ask if they are familiar with the applicable section of the law and, if yes, how likely it is that decision-makers will agree with your conclusions.

13. If you feel you have identified a win-win solution, then ask the attorney for their opinion on the reliability of the solution from a legal perspective. Ask if they would be willing to contact the applicant to arrange a negotiating meeting. Ask if they would be willing to attend the negotiating meeting with you. Of course, ask what it would cost to do any research needed to assess solution reliability and to attend the meeting.

Few attorneys will give great answers to all of the questions suggested above. Obviously, some questions are more critical than others. Frequently, the selection of an attorney comes down to who impresses you the most.

Once you retain an attorney, do not make a secret of it. This action alone will not produce victory, but it does increase the likelihood of a successful outcome. Again, hiring an attorney shows the applicant and others that you are committed to winning.

MINIMIZING THE EXPENSE OF LEGAL ACTION

In those cases where legal action was necessary, our clients have spent as little as $1,000 and in excess of $100,000. Legal action usually begins at an administrative hearing before a planning commission, a board of appeals, or a local legislative body. If an attorney is needed then their fee will be about $3,000 to $5,000 plus an average of $1,500 for each expert witness. Typically, an administrative hearing ends up costing $5,000 to $10,000. There will usually be two or three levels of appeal following the administrative hearing. Each level of appeal usually costs another $5,000 to $10,000, most of which is attorney fees.

From my conversations with citizens who did not use our services during administrative and appeal hearings, their costs are two- to five-times greater than what our clients spend. I usually get a stunned silence when I describe our usual cost figures. I attribute the silence to the caller trying to determine if I'm being honest. To me there is little mystery in why we can put on high-quality cases that cost our clients a fifth to half of what attorneys outside our network charge citizens.

First of all, because we specialize in helping citizens with development issues and we do this throughout the United States, we have far greater experience than most in what works. Because of the unique depth of our expertise it is very easy for CEDS to identify issues, solutions, and determine if and where legal action is warranted.

Second, the 130 attorneys in the CEDS network specialize in representing citizens in land use and zoning cases. Most of the attorneys outside our network who represent citizens practice relatively little land use and zoning law. This means citizens are paying the attorney to educate themselves about an area of law new to them. When citizens utilize attorneys in the CEDS network they are only paying the attorney to prepare then argue their case.

Third, the attorneys in our network are comfortable allowing citizens to perform a large part of the legwork the attorney or a paralegal would normally perform. The attorney's comfort level is higher if the citizens are following the guidance provided in this book when carrying out the legwork.

Fourth, as you will see in the section below on *Expert Witnesses*, we are very efficient at identifying and preparing professionals for testimony.

With the guidance provided in this book you can use these same four factors to minimize cost while maximizing the likelihood of victory in a legal arena.

Citizens will occasionally ask about free or *pro bono* attorneys. There are certainly many examples of cases won by attorneys working for free. The Chapmans Forest case described in Chapter 27 was won with the help of several pro bono attorneys, though it was ultimately political action which won this campaign. The cases which attract pro bono attorneys tend to be very high profile where the attorney will benefit from substantial publicity. In reality, it is rare for an attorney to offer their services for free unless the case will generate considerable of exposure for them.

LEGAL VS. FACTUAL ISSUES

The issues presented at a hearing tend to be classified as either legal or factual, though frequently an issue has elements of both. Following are examples of legal and factual issues.

Legal Issue

Let's say zoning regulations state that a building shall not be within 25 feet of a street in a residential district. Unless a variance or waiver is granted then a decision to approve a building 20 feet from a street would likely be overturned by the courts on appeal.

Factual Issue

If the applicant does seek a variance or waiver then more subjective criteria might come into play, such as the following from *Chapter 31: Variances & Waivers*:

1. that an unnecessary hardship exists which is not created by the party seeking the variance and which is caused by unique physical circumstances of the property for which the variance is sought;

2. that a variance is needed to enable the party's reasonable use of the property;

3. that the variance will not alter the essential character of the district or neighborhood, or substantially impair the use or development of the adjacent property such that it is detrimental to the public's welfare; and

4. that the variance will afford the least intrusive solution.

Since the applicant would have the burden of proof their attorney would likely call an expert in land planning and/or site design to present facts regarding each of these four criteria. The expert would then be asked to draw conclusions, based upon these facts, demonstrating that all four criteria are met and, therefore, the variance should be granted. The difference then between a legal and factual issue is that the former tends to clearly conflict with an applicable section of the law while the latter tends to be more subjective and open to debate.

Legal issues are generally the least expensive because the attorney can argue the issue as a matter of law without an expert witness. But a factual issue will likely require testimony from at least one expert witness which adds to the cost and duration of the hearing.

If your *Chapter 35* research showed that the final decision-maker is applicant oriented, then you are less likely to win on a factual issue. This is because the courts generally defer to a planning commission or some other final decision-maker on factual issues. In many states, courts will uphold a decision as long as there is at least a *scintilla*[232] of evidence in the record supporting the conclusion

[232] **Scintilla** >noun a tiny trace or amount: not a scintilla of doubt.-ORIGIN Latin, 'spark'.

on the factual issue. You might present a Ph.D. land planner to rebut the applicant's planner who has just a Bachelor degree, yet the courts would still uphold a decision based upon the testimony of the less qualified witness. The key question the courts will look at is: Was the issue *fairly debatable*? In other words, could a reasonable person have reached the same conclusion as the final decision-maker based upon the evidence? If the answer is yes, then the question is fairly debatable and the courts will usually uphold the decision.

So, if your *Chapter 35* research did show that the final decision-maker is very applicant oriented, then focus your limited resources on finding good legal issues. A good legal issue improves your chances of winning on appeal. Since the decision-maker is predisposed to believe the applicant's experts you will avoid the expense of hiring your own expert witness. However, if applicant attorneys have grown lazy from years of getting what they want, they may be so sloppy in getting even a scintilla of evidence into the record that factual testimony from your expert could cause the courts to side with you on appeal. Of course, you should get advice from a good attorney when trying to decide where to focus your limited resources for legal action.

HEARING PROCEDURES

The most common arena for legal action in a land use case is a hearing before a planning commission, a Board of Appeals, a Town Council, or some other decision-making body. The purpose of the hearing is to create a formal opportunity for staff, the applicant, and the public to put facts into evidence which each believes to be relevant to the criteria the body must consider in rendering a decision on a specific permit or approval. If you completed the actions suggested in *Chapter 35: Researching Strategy Options* you will have the criteria in hand along with facts supporting your belief that the criteria have not been met.

Hearings tend to be of two types: legislative or a semi-formal hearing.

Legislative

A hearing on a master plan, a plan amendment, a zoning text amendment, a rezoning, or other legislative action tends to be very informal. Each person gives their testimony, usually with a three- to ten-minute time limit. There is no cross-examination and the decision-maker, usually the local legislative body, asks few questions. The record may remain open for a week or two so written comments can be filed. The body meets again in public to discuss the facts in the record, the relevance of the facts to decision-making criteria, then the body will vote to approve, approve with conditions, or deny.

Administrative Hearing

This type of hearing somewhat resembles a television courtroom drama, though the rules of evidence are relaxed and everyone tends to behave with civility. Normally, staff make their presentation first followed by the applicant then the public get their say. If citizens are represented by an attorney then they put on their case after the applicant concludes. The members of the decision-making body, the applicant's attorney, and staff usually have an opportunity to ask questions (cross-examine) each person who testifies. Citizens who are not represented by an attorney may also be allowed to cross-

examine staff and applicant witnesses. After testimony is completed the applicant and staff may have the option of putting on rebuttal witnesses to refute statements made by each other and the public. The body may render a decision at the end of the hearing or sometime thereafter. A semi-formal hearing is more likely for a subdivision or site plan, a special exception, a conditional use permit, a special use permit, or a variance.

Rules of Procedure

At your earliest convenience, well in advance of the hearing, see if the decision-making body has adopted rules of procedures or other guidelines for how their hearings are conducted. The rules or guidelines may contain requirements critical to your case. For example, one Board of Appeals in my home state requires citizens to submit written reports 30 days in advance of a hearing. Miss this deadline and your expert witness cannot submit a report.

The rules of procedure may be part of the zoning ordinance or some other portion of the ordinance. They may also be in the form of a policy document. I urge you to contact the office of the decision-making body to see if rules of procedure or other guidelines exist for conducting the hearing. Be certain to check the rules or with office staff about time limits on testimony by citizens and expert witnesses.

Postponements

Decision-making bodies will postpone a hearing if you can show a good cause. For example, if you were supposed to receive notice of the hearing, but you did not, then you might get a postponement, particularly if you did not learn of the hearing until two- or three-weeks before the hearing date. If you just hired an attorney they may convince the applicant's attorney to agree to a postponement as a professional courtesy. If you cannot get a postponement and numerous citizens plan on testifying then you may get a second hearing date simply because testimony could not be completed during the day (or night) of the hearing. Of course, it would be unethical to have a lot of people testify just to get a continuance of a hearing.

Hearings that begin in the morning usually adjourn by the end of the work day. Those starting in the evening usually end by 10:00 pm or so. But I also recall one hearing which started at 6:00 pm, went all through the night, then at 8:00 am the next morning the decision-making body adjourned, drove out to the project site, and reconvened the hearing which finally ended at 10:00 am - 16 hours after it started!

Conflict of Interest & Decision-Maker Recusal

Occasionally, a member of a decision-making body will have a connection to one of the parties in a case that it rises to the level of a conflict of interest. When this occurs you may succeed in forcing the individual to recuse themselves from hearing the case. What constitutes a conflict of interest sufficient to warrant recusal varies from state to state. Generally, the conflict must be pretty blatant. For example, being a realtor is not necessarily grounds for recusal in a case involving a proposed development project. However, recusal is more justified if the realtor has a financial interest in the

project, the applicant is their brother-in-law, or the realtor specializes in selling only houses built by the developer.

I urge you to pursue recusal only in the most extreme cases and only after you have consulted with an attorney specializing in this area of the law (ethics) in your state. An unsuccessful effort to force a recusal could sour your relationship with not only the target but other members of the decision-making body.

Court Reporter

If you think there is a strong likelihood that the decision-making body will rule against you and you plan to appeal, then consider having a court reporter present to make an accurate record of the hearing. Even if the hearing is taped, I urge you to go to the added expense of hiring a professional court reporter. As someone who has tried to figure out who said what from hearing tapes, the record created by a court reporter makes it much easier to draft the legal documents required for an appeal.

Required Findings

The decision-making criteria referenced throughout this book are also referred to as required findings. In order for a decision to stand up on appeal it must be supported by a document addressing the required findings. The document will contain a description of the facts presented before the decision-making body and why these facts led the body to conclude that the applicable criteria had or had not been met.

For a legislative body these required findings may take the form of a resolution. The courts, many hearing officers, and a Board of Appeals may publish required findings as a formal decision. A rural planning commission may document their required findings in minutes.

Once a decision is rendered it is critical that you obtain a copy of this document. See if it contains all of the required findings. Verify that each finding is supported by facts present in the hearing record. If not, then this alone might give you a good chance of overturning the decision on appeal. In fact, we have won a number of cases because of this very issue. Frequently, though, the win is temporary since the courts usually remand (send back) the document so the decision-making body can dot the i's and cross the t's. But if facts supporting a required finding simply are not in the record then another hearing may be needed.

WITNESSES

The evidence supporting factual issues must come in through witnesses. The witness must explain what the evidence is, how it was obtained, and why it demonstrates that the legal requirements for approving, conditioning, or denying a permit-approval have or have not been met.

There are three types of witnesses: expert, fact, and lay witnesses.

> **Expert Witness:** These individuals can demonstrate that through their education, training, and work experience they have acquired an understanding of a subject which is superior to

that of the general public. Because of this expertise this type of witness can introduce factual evidence and interpret how this evidence relates to specific criteria the decision-maker must consider. Generally, as an expert witness' years of experience and level of education increases, so does the weight (influence) of their testimony.

Fact Witness: This type of witness lacks the experts' specialized training and experience in the subject matter of their testimony and is limited to just testifying as to the existence of specific facts. For example, the witness could testify that a road is, say, 16-feet wide and this fact would probably be accepted into evidence. But the witness could not then offer an opinion as to what limits on traffic volume should apply to a road 16-feet in width. Or if the decision-making body permitted the witness to state an opinion it would have less weight then if a veteran traffic engineer offered the same opinion.

Lay Witness: Most of those who testify at a hearing are classified as lay witnesses. But please don't take this as demeaning. In fact, I have seen many cases won by lay testimony. Of course, a lay witness is free to testify about their perception of facts and state their opinion on how these facts bear on legal requirements. But unless the witness demonstrates specialized knowledge of the subject area gained through education, training, or experience the testimony may not carry the day. This is particularly true if the applicant puts on an expert witness to rebut the lay testimony.

I recall one case where a client gave lay-witness testimony about sight-distance using the CEDS procedures presented in *Chapter 23: Traffic*, of this book. The applicant's attorney was sloppy and did not present a rebuttal witness. Because the facts and opinion offered by our client was the only testimony in the record on sight-distance and this testimony showed that legal requirements were not met, the hearing officer denied project approval based solely on the lay testimony.

Our client was very lucky in the sight-distance case described above. In most cases, the applicant's attorney will have an engineer in the hearing room, ready to offer rebuttal testimony and prevent this exact situation from occurring. Had the applicant's attorney put on a rebuttal expert witness the hearing officer would have been obligated to approve the project, other wise his denial would have been quickly overturned on appeal.

Expert Witnesses

I strongly urge you to line up someone who can qualify as an expert witness for each issue you hope to win on before the final decision-making body.

How do you find expert witnesses?

Well, like attorneys, most professionals who work as expert witnesses in development cases do so for the applicant and are reluctant to assist citizens. Fortunately, attorneys specializing in representing citizen usually have a number of willing expert witnesses they have used in the past. While these experts frequently charge a reduced fee for citizen clients, they cannot work for free.

If your resources are limited, as they usually are, then look among your own supporters for professionals who may qualify as experts and are willing to testify for no-cost/low-cost. But keep in mind that just because someone has the right credentials they are not necessarily a good witness - someone who takes the time to thoroughly analyze an issue and can present their conclusions in a concise, compelling way. Unfortunately, it is hard to tell in advance whether an expert will make a strong or weak witness. This is why attorneys prefer using experts they have seen testify before.

Other places to find good expert witnesses are among the faculty of colleges and universities. Frequently local, state, or federal officials also make good expert witnesses and have the added advantage of being free. However, prevailing political winds may cause these officials to be a weaker witness when compared to a truly independent expert. Citizen advocacy groups, such as those listed for your state on the CEDS State-By-State Resources webpage, may know of professionals who have been good expert witnesses in other cases. And if all else fails there is always the yellow pages. You may have difficulty finding local professionals to take your case. If this happens then try calling professionals located in other parts of your state. But be prepared to call a dozen or more firms before finding one: a) willing to work for citizens, b) at a price you can afford, and c) who inspires confidence. If you have difficulty finding the right expert, then contact me at 1-800-773-4571 or Rklein@ceds.org.

Following are some suggestions for getting the strongest expert witness testimony for the best price.

Condense: You may have hundreds of pages of documents as a result of your efforts to *Obtain All Relevant Documents* as described in *Chapter 35: Researching Strategy Options*. There will likely be one of two results if you ask a witness to go through all of these documents to determine the validity of a specific concern. First, the expert will ask for a much larger retainer. Second, it will take a longer time to get an initial opinion. A third result is also possible: They'll decide the case is more trouble than it's worth. Instead, separate out the documents relevant to the issue you would like the expert to consider.

Criteria: Expert witness testimony only makes sense if it directly relates to legal criteria the decision-making body must consider. If you feel specific criteria have not been met then prepare a copy of the relevant ordinance, regulations, or policy document in which the criteria appear. Highlight the criteria and place a post-it on the page(s) where the text appears if the document is large.

Relevant Facts: Go through the condensed documents and highlight the facts which you believe support your opinion that the decision-making criteria have not been met.

Issue Summary: Prepare a summary of the issue you would like the expert to consider. The summary should include basic information such as the applicant's name and the name of their attorney and consultants. The expert will need this information to determine if they have a conflict of interest. Next, add a paragraph to the summary about why you are concerned about the project and the issue. Present the criteria you believe are relevant to the issue and a description of the facts

supporting your belief that the criteria have not been met. End the summary by stating that it represents your perception of the criteria and relevant facts. Make clear the fact that you are not an expert in this area. Instead, you prepared the summary in hopes of making it easier for the actual expert to form an initial opinion on whether there is a valid issue.

Initial Opinion: Once a potential expert witness has agreed to look at the issue and has confirmed that a conflict of interest does not exist, ask if you can meet at their office. During the meeting go over the information presented in the summary and point out the highlighted documents supporting your belief that a valid issue exists. Next, ask if this information is sufficient for the expert to form an initial opinion. If more information is needed then see if you can get it or ask the expert what it would cost for them to do this legwork.

If the expert says they do believe your concerns are valid and the relevant criteria may not be met, then ask what it will cost to form a final opinion and then present testimony before the decision-making body. Get a quote on an additional fee to prepare a report, but consult with your attorney before actually asking the witness to prepare a report. In some cases a report is crucial; in others it's just an unnecessary expense. If your attorney opts for a report then determine if the decision-making body requires submission of reports in advance of a hearing.

Of course, you should also make certain the expert witness is available on the scheduled hearing date(s). If there is a scheduling conflict then go to the section on *Postponements* under *Hearing Procedures* above for advice on seeking another hearing date when the witness is available. Finally, find out when the expert will complete whatever additional work is needed to reach a final opinion. Urge the witness to pick a date at least a week or two in advance of when they would present their testimony. Schedule a date around that time when the expert can meet with you and your attorney to review testimony.

Qualifications: If the initial opinion of the expert is favorable, then ask for a copy of their resume' or Curriculum Vitae (CV). Ask the witness if they have qualified as an expert on the issue which will be the focus of their testimony. If they have, then so far so good. Ask also if they have ever been rejected as an expert on the issue. If they have then this is a serious problem. Ask if you can contact former clients to get a reference on the quality of their assistance. Be certain to talk with the former clients to verify that the expert can provide strong testimony. Finally, ask your attorney to review the resume-CV and the responses to the questions posed above to determine if the witness can qualify as an expert.

Review of Testimony: As suggested above, meet with the expert a week or two before they are scheduled to testify. If you have hired an attorney then it is critical that they be present for this meeting. The purpose of the meeting is to ensure that both the expert witness and the attorney are fully prepared.

Expert witness testimony usually conforms to the following outline:

- Name, place of employment, and business address;
- Qualifications (education, training, and work) in general and, most importantly, specific to the focus of their testimony. Be certain the witness brings at least three copies of their resume' or CV to the hearing;
- Occasions when they have qualified as an expert on the issue which is the focus of their testimony and whether they have ever failed to qualify as an expert;
- How and when they became involved in the case and what they were asked to do;
- What steps they took to determine if a significant issue existed - the documents they reviewed, any field work, analyses, discussions with agency staff or other experts;
- What facts they considered in forming an opinion and how they came by these facts; and
- Their opinion and why this opinion demonstrates that the project fails to comply with the criteria the decision-making body must use as the basis for granting, conditioning, or denying project approval.

It is ***critical*** that the testimony be very specific to the site and project at issue. If general, the applicant's attorney will have a much easier time refuting the testimony.

It is also ***critical*** that your attorney be present for this review and that both of you anticipate the hardest questions the applicant's lawyer may ask. Additionally, ask the expert to speculate about counter-arguments he would offer if he was the applicant's rebuttal witness. Going through this exercise a week or two before the hearing should flush out all the weaknesses in the testimony while still allowing sufficient time to correct any defects.

The purpose of reviewing testimony is, of course, ***NOT*** to tell the witness what to say. Most credible witnesses will refuse to do so and will abruptly end their relationship with you. Instead, the purpose of the review is to ensure that:

- all essential facts have been gathered;
- the facts can be presented in a way that satisfies the rules of evidence;
- the conclusions based upon these facts are logical;
- the relevance of the conclusions to decision-making criteria is clearly presented; and
- that your attorney fully understands the testimony.

Again, it is ***critical*** that your attorney be present for the review of each expert witnesses' testimony. I say this for two reasons. First, it is your attorney who will be asking questions of the witness. These questions must be designed to get all of the essential facts and conclusions into the record. The better your attorney understands the issues and testimony, the better they will be on the direct-examination (questioning) of each witness. Second, your attorney will be doing the cross-examination of applicant witnesses rebutting the testimony of your expert. To handle the cross successfully your attorney must fully understand the basis for your expert's conclusions and the likely counter-arguments. ***And there are always counter-arguments.***

You would be surprised how often attorneys representing citizens fail to thoroughly review and comprehend expert witness testimony. In fact, several of our early cases were lost because of an attorney who failed to fully prepare in this way. I have sworn to never let this happen again. Yet, to this day a disturbing number of attorneys downplay the importance of thorough preparation. Usually the attorney is trying to save the citizen's some money and sometimes they are juggling too many cases. In either situation I insist that the attorney attend the testimony review. This does not always make me popular with the attorney but I figure my job is to help citizens protect their quality of life. As far as I'm concerned, nothing should ever get in the way of this primary responsibility. In fact, a big part of what I do in managing cases is to make certain that everyone knows their job, has the resources to get it done, and gives it 100%. This is a major factor accounting for the phenomenal 75% success rate enjoyed by our clients.

The steps described above may seem like a lot of trouble, but I assure they are well worth it. Condensing relevant information and the other suggestions given above can cut the total cost of testimony from one witness from a normal $4,000 to $7,000 down to $1,000 to $2,000. Plus, you end up with much stronger testimony and an attorney who is more fully prepared, both of which gives you a much greater likelihood of a favorable decision.

ADVICE FOR CITIZENS PRESENTING TESTIMONY

You and most of your allies will be testifying as lay witnesses. The purpose of citizen testimony differs from that of a fact or expert witness in that it should send a political message as well as getting facts and conclusions into the record which are relevant to decision-making criteria. It is also okay, sometimes even valuable, to include some emotion in citizen testimony. But if a number of citizens will be speaking then their testimony should not be repetitive.

Generally, citizen testimony should be no more than three- to five-minutes long. I have heard many eloquent citizens present highly effective testimony and rarely did it take more time than this. Of course, if the decision-making body imposes a time limit on citizen testimony then you must adhere to the limit. Following is an outline of testimony I suggest to our clients.

- State your name, address, and where you live in relation to the development site;
- Describe how you came to learn of the project and the hearing;
- Explain how you believe the project will affect your quality of life and that of your family and neighbors (assuming they will not be testifying). Focus on those quality of life elements which are within the scope of the hearing. In other words, if the hearing is solely about wetland impacts don't get into traffic and schools; stick to wetlands;
- Describe any efforts you made to work with the applicant, staff, or elected officials to resolve your concerns and the outcome of these efforts;
- Present the facts which led you to believe that the project will adversely affect the elements of your quality of life under the decision-makers purview;
- Explain why you believe these facts demonstrate that specific decision-making criteria have not been met;

- End by asking the decision-maker to take whatever specific action will resolve your concerns, which is usually to deny approval or grant approval with conditions; and
- Let the decision-maker know you are finished by saying: *"Thank you. Any questions."*

If you have hired an attorney than get a copy of your testimony and that of other citizens to the attorney well in advance of the hearing. This will allow the attorney to verify that nothing in your testimony conflicts with anything your expert witness(es) might say. Also, your attorney can follow along as you present testimony. If you missed a point your attorney can ask you a question as a reminder.

Be certain to rehearse your testimony by repeatedly reading it aloud. Try to get to the point where you can read it completely from memory or by glancing just a few times at your notes. When you reach this point you will find that stage-fright and other nervous reactions to public speaking will have diminished greatly. Please ***DO NOT*** stand before the decision-making body and read from a piece of paper held in front of your face.

If you find that you must exceed the time limit to make every point in your testimony, then consider submitting a letter into the record with the points you cannot include. After completing your testimony ask the chair of the decision-making body if you can submit additional comments into the record in the form of a letter. Bring enough copies of your testimony, letter, and any other documents so you can one to each member of the decision-making body plus a few extra for their staff and the applicant's attorney. Prior to the start of the hearing ask the chair or staff if you should submit these documents in advance or wait until you testify.

If there will be a number of citizens testifying then pester them to get their written testimony to you well in advance of the hearing. If they cannot seem to commit their testimony to writing then push for just an outline. From these documents try to figure out a logical order for testimony.

If there are dozens or hundreds of citizens who wish to testify and you believe they will all be saying much the same thing, then consider giving everyone a break with the following tactic. Make certain your testimony contains all the points others would cover. Ask each of those who plan to attend the hearing if your testimony does address their points. If they say yes, then ask if they would agree to forego testimony and instead stand when, at the end of your testimony, you say:

Now, I ask everyone present who agrees with me to stand.

If you explain to folks that this will get your collective points across, make a very favorable impression on the decision-making body, and get the hearing over sooner, most will agree enthusiastically. The few who don't are free to testify. Again, this tactic can be more effective than hour upon hour of citizens testifying on essentially the same points.

STANDING

In many localities a legal action can only proceed if it is filed on behalf of at least one person who meets a *standing* test as an *aggrieved party*. Try to get those in your group who may have standing to attend the hearing and preferably testify. If they do not testify then make certain they sign-in on the sheet set out by the decision-making body. In some jurisdictions, an appeal can only be filed on behalf of a party who attended the relevant hearing.

Usually, the standing test requires a demonstration that the rights and privileges of an individual will be harmed in a way that is greater than that of the general public. The actual test ranges from very lenient to strict. In some cases one must only live within sight or sound of a project site to have standing. In other situations one must own property adjoining the site that will be adversely affected if the project is approved. At the federal level organizations such as the Sierra Club can become parties but a number of states and local jurisdictions only allow individuals to be parties.

If you retain an attorney then ask if there will a problem with standing? The attorney will likely ask where you and your allies live in relation to the project and how the project will affect you. From this description the attorney should be able to say whether standing will be an issue.

TAKINGS & PROPERTY RIGHTS

The takings issue often comes up when a local government expresses concern about being sued. The fifth amendment of the U.S. Constitution protects all of us from the government taking our property without just compensation. At the same time government has an obligation to protect all of us from property uses that interfere with our rights. But when does the action of government in regulating land use go from a legitimate exercise of authority to a taking? An incomplete answer is any government action which prevents economically viable use of property without compensation. In 1980, a case known as Agins v. Tiburon[233] produced a "takings" test which goes like this:

> *Does a government action advance some legitimate purpose and, if so, does the property owner have any economic use left once the government action takes effect?*

If the answer is no then the action may be a taking and property owner compensation may be required.

Occasionally, property owners, development interests, or decision-makers will claim that land use regulation violates the inalienable rights of the property owner. While it is true that an owner cannot be denied all use of their property without just compensation, it is also true that one may not use their property in a way that interferes with the rights of their neighbors. This concept dates from the founding of the United States and actually goes far back in English law. In fact, the Roman law known as the Twelve Tables, promulgated in 450 B.C., contained setbacks and other restrictions on use of property so as to protect neighboring property owners.

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[233] Agins v. City of Tiburon, 157 Cal.Rptr. 372, 598 P.2d 25 (Cal. 1979)

Claims that property rights are inalienable can be traced back to the writings of Sir William Blackstone in 1738. While Sir William did write that property rights cannot be violated even for the general good of the whole community, he was referring to the inherent right of Englishmen to own property.[234] Blackstone went on to say that property could be used and enjoyed without control or diminution *save only by the laws of the land*. Clearly, these "laws of the land" would be those designed to restrict uses of property which would injure one's neighbors.

STAYS & INJUNCTIONS

A stay prevents an agency from issuing a permit and thereby prevents an applicant from breaking ground. Some agency regulations automatically stay the issuance of a permit if an appeal is taken of a project approval, usually though for just the first level of appeal. In other situations a request must be made for a stay.

Citizens also have the options of asking the courts to enjoin an applicant from proceeding with a project. Frequently, two requirements prevent citizens from proceeding with an injunction. First, they must show that some irreparable harm is imminent if the project proceeds. Second, they must post a very large bond. It is usually the great expense of the latter requirement that dissuades citizens from pursuing injunctive relief.

As a practical matter, once citizens take an appeal of a permit-approval most projects do not proceed. This is because most projects are backed by bank financing. Banks are very leery of financing a project that is on appeal. However, you should ***never, never*** take an appeal for the purpose of delaying a project or affecting the applicant's financing. This is not only unethical and illegal but it could also make you the losing party in an expensive lawsuit.

PETITION & REFERENDA

In a number of localities citizens have the right to take a decision of the legislative body directly to the voters through petition or referendum. During the next election voters may have the right to undo a decision to approve a fatally-flawed project. But this right is by no means universal and it frequently only applies to new laws, not actions such as approving a proposed development project.

The petition and referendum process is not the same thing. In general, the petition process allows voters to change the law without having to go through the legislative body. The referendum process allows the voters to undo certain decisions made by the legislative body.

Check with the local legislative body or planning and zoning officials to see if this right exists in your jurisdiction. If they say no and you have any reason to question this, then please contact me

[234] See Chapter II in *Land Use in a Nutshell*, 4th Edition, West Group, P.O. Box 64526, St. Paul, MN 55164-0526 http://west.thomson.com/default.asp

at 1-800-773-4571 or Rklein@ceds.org. I may be able to contact one of the attorneys in our network to see if they can verify what you have been told.

If the right of petition or referendum is available then you will be in a race to meet the requirements for getting it on the ballot for the next election. First, you must get a minimum percentage of voters to sign a petition calling supporting the call for a referendum. Be certain that the form of the petition complies with legal requirements by having an experienced attorney review the form. There will be a time limit by which you must obtain the signatures.

It is critical that you make certain those who sign the petition are registered to vote within the appropriate jurisdiction. You should strive to get at least 10% more signatures then are actually needed. Many signers vote infrequently and think they are still registered, while in fact they are not. So a portion of petition signers are always disqualified. Again, get at least 10% more signatures than you need.

Once you get the measure on the ballot make certain it is worded clearly and in a way that is fair. It will likely be the local government who decides how the measure appears on the ballot. It is not uncommon for a measure to be so poorly worded that it's unclear whether a yes vote supports or defeats the measure.

The biggest challenge will be getting a large enough percentage of votes to win the measure. In some localities a simple majority (51%) wins. In other areas the measure only carries with a super majority of votes (60%, 66%, etc.). As a general rule of thumb, you should only proceed with a petition or referendum if initial polling shows that at least 50% of voters will support the measure.

There is much more that goes into a campaign to win by petition or referendum. For further detail see *The Campaign Manager: Running and Winning Local Elections*[235] or contact me at 1-800-773-4571 or Rklein@ceds.org. Within the CEDS network are a number of professional campaign managers who have overseen successful petition and referendum drives. If you wish, we can discuss the cost of having a member of the CEDS network take a quick look at your proposed effort to assess the likelihood of success.

PROTEST PETITION

In a number of local jurisdictions citizens have the right to file a protest petition, which requires a super-majority to approve actions such as a rezoning request. A super-majority may mean that 66% or 75% of the members of the local legislative body must vote in favor of the action for it to be approved. If a protest petition is not filed then the action is approved by simple majority vote (>50%).

[235] *The Campaign Manager: Running and Winning Local Elections*, by Catherine M. Shaw, published 2004 by the Westview Press.

The requirements to invoke a super-majority vote through a protest petition vary from state to state and with the nature of the action. In the case of a proposal to rezone a number of properties, one may need the signature of 20% or more of all affected property owners to invoke the super-majority vote requirement. If only one property is proposed for rezoning then you may need signatures from, say, 20% or more of those owning property within a set distance, such as 100-feet, from the property boundary.

Check with local planning and zoning officials to learn if the protest petition process applies to the action of concern to you. Of course, you should also verify what you are told by consulting with a land-use or zoning attorney.

LAWSUITS AGAINST CITIZENS & GOVERNMENT

At one time it was common to hear of applicants who threatened to sue citizens for opposing their projects. In fact, this form of harassment even gained a name - a SLAPP suit, which stands for *Strategic Lawsuit Against Public Participation*.

The first amendment of the U.S. Constitution provides each of us with the right to petition government for redress of grievances. A SLAPP suit may stifle this right. A number of citizens hit with SLAPP suits have *BackSLAPPed* with a counter suit and won when the courts found they were just exercising their first amendment rights. But its still no fun to be sued.

SLAPP suits tend to be an act of desperation and are usually filed when an applicant fears they are about to lose. Many people, including most decision-makers, find SLAPP suits quite offensive and will turn away from an applicant who resorts to this tactic. The exception are situations where a citizen has been acting in an inappropriate manner and engaging in their own less than honorable tactics. So the best way to avoid a SLAPP suit is to focus on your core issues and state your public position along the lines of:

> *Our goal is not to stop the project, but to ensure that all significant impacts have been resolved before the project is approved.*

For further information on SLAPP suits visit the Anti-SLAPP Resource Center website at:

http://www.thefirstamendment.org/antislappresourcecenter.html

Occasionally, a local planning commission will express reluctance about denying or conditioning approval of a project for fear of being sued by the applicant. In these instances it helps to either have the citizen's attorney or the commission's legal counsel advise them at the hearing on what they can and cannot do without risking the loss of a lawsuit. During your testimony you might point out how much more risky it is for the commission to approve projects that are not in conformance with approval criteria. Taken to a logical extreme, the commission might one day find itself approving an adult bookstore next to an elementary school because the applicant threatened a lawsuit.