

Chapter 35: Researching Strategy Options

INTRODUCTION

At the beginning of this book, in *The Secrets of Success*, I urged you to:

...aggressively pursue smart solutions to your core concerns.

This Part of the book is all about identifying, then aggressively pursuing the implementation of *Smart Solutions*.

What is a *Smart Solution*? I define it as one which:

...fully resolves each of your core concerns in a way that is lasting with the least effort and expense on your part.

There are usually several, frequently many, ways of resolving each of your core concerns. Each will vary in the degree to which it fully resolves a concern. Each will also vary with respect to long-term reliability. Additionally, each way differs in terms of the amount of time and expense you must expend to get it applied in a way that fully achieves your goals for years or decades to come. Thorough research is essential to identifying all smart solutions then selecting the best. It is this research which is the focus of this chapter.

The research recommended in this chapter can be carried out by volunteers, provided they have the time and motivation. If you run into any problems then I would be delighted to answer specific questions. Our advice is available free of charge to citizens working to preserve community quality of life. Just give me a call at 1-800-773-4571 or email me at: Rklein@ceds.org. In addition, we can also carry out the research for you. See *How CEDS Can Help You Find The Best Strategy* at the end of this chapter for further detail on this service.

BASIC STRATEGY OPTIONS

There are seven basic strategy options available to citizens for winning the implementation of a smart solution:

1. Negotiate with the Applicant When a Win-Win Solution is Available;
2. Work with Regulatory Staff to Implement a Solution Through the Growth Management Process;
3. Lobby Final Decision-Makers to Adopt Your Preferred Solution;
4. Initiate Legal Action to Increase the Likelihood that Your Preferred Solution is Adopted;
5. Change the Law if Current Regulations Do Not Allow Resolution of Your Concerns;
6. Elect New Decision-Makers if Incumbents are Unresponsive to Community Concerns; or

7. Preserve the Site in Total or in Part.

In reality, many campaigns use a combination of these seven strategy options. Citizens will initiate discussions with staff and the applicant in hopes of reaching an agreement. Negotiations will then reach an impasse. Citizens will turn to elected officials urging them to use their influence with agency heads and the applicant to get negotiations going again. If the citizens are dissatisfied with what elected officials offer then legal options are pursued with the goal of convincing a decision-maker to deny a specific permit-approval or add conditions resolving citizen concerns. Once citizens initiate litigation the applicant faces the possibility of spending large sums on lawyers and experts while project ground-breaking is delayed. This puts increased pressure on the applicant and may prompt them to return to the negotiating table.

Determining which strategy option offer the best opportunity to resolve your concerns requires a fair bit of research. *Chapter 1: The Easy Solution*, provided an introduction to this research. The following guidance expands upon this introduction and explains how to decide which of the seven basic strategy options offers the greatest likelihood of resolving your concerns for the least cost.

FIRST, PRESERVE YOUR RIGHTS

By *Preserve Your Rights*, I mean make certain you do not miss critical opportunities to present your concerns to decision-makers or to appeal an unfavorable decision. In far too many towns and counties citizens get very little notice before permit decisions are made. Once a decision is made there may be as little as ten- to thirty-days to appeal this action. So your first step in forming a winning strategy must be to:

- identify all permits and other approvals the project will require;
- determine which will be the subject of a formal hearing or comment period and when each hearing-comment period is scheduled (or likely) to begin;
- learn how you can participate in the hearing or submit comments and learn of any scheduling changes; and
- the process for appealing a decision to grant each permit-approval if this happens before your concerns are fully resolved.

Again, the purpose of this research is to ensure that you do not miss any critical opportunities to influence decision-making or appeal an unfavorable decision. This information will then allow you to budget your resources (time and money) so you can proceed with other research. This information also allows to you to preserve your opportunity to influence decision-making or to take an appeal.

Begin your research into preserving your rights with the *lead* agency. For most development projects there will be one agency which is responsible for coordinating reviews by other agencies

then compiling the results of the reviews into a report and a set of recommendations. This is the *lead* agency.

In addition, there is usually one individual who acts as the project reviewer for the lead agency. It is this *lead* person who does the coordination and drafts the report-recommendations. The lead staff person should be able to tell you which permits-approvals the applicant needs and answer process questions such as:

- when hearing(s) or comment periods are scheduled to begin;
- how to participate in each hearing and submit comments; and
- how to appeal a decision unfavorable to your interests.

Additional advice on working with this lead staff person can be found in *Chapter 38: Working With Regulatory Staff*. If you have any questions regarding how to carry out this research, then please feel free to contact me at: 1-800-773-4571 or Rklein@ceds.org. There is no charge for answering questions from citizen advocates by phone, provided the question doesn't require research.

Which of the seven strategy options offers you the best chance for victory depends first on whether a Win-Win solution is available and secondarily on which permits-approvals the applicant needs.

IS A WIN-WIN SOLUTION AVAILABLE?

Part I of this book, *Identifying & Resolving Quality of Life Issues*, provided background on 24 categories of impact caused by land development. The 24 chapters in Part I also identified a number of ways of resolving each category of impact. For most projects, these solutions will reduce impacts to a point where they no longer impair quality of life yet allow the applicant to get much of what they want. Of course, this is what I mean by a *Win-Win* solution.

Advice is provided in *Chapter 37, Negotiating With The Applicant, on Finding A Win-Win Solution*. No strategy option provides as quick and easy a path to victory as a win-win solution. However, you may need to gain considerable leverage over the applicant before they will enter into an agreement that fully binds both current and future property owners to the solution. This leverage can be gained through the second, third, and fourth strategy options presented above:

- working with regulatory staff to make the Win-Win solution a condition of a permit or other approval;
- lobbying final decision-makers to support your solution; or
- through legal action.

A specific permit-approval will frequently provide the best opportunity to gain additional leverage through these three strategy options. The section of this chapter headed *Evaluating Strategy Options for Winning Specific Permits-Approval* will explain how to gain this leverage.

If you have found a genuine win-win solution, yet the applicant refuses to adopt it or enter into a binding agreement, then your goal must to either:

- A. Convince a decision-maker to add conditions requiring full implementation of your win-win solution to the appropriate permit-approval; or
- B. Seek to defeat the project by convincing decision-makers to deny an essential permit or approval.

Later in this chapter I will explain how to research legal authority and decision-maker history. If this research shows that decision-makers routinely add conditions of the type you are seeking, and the conditions have always effectively resolved concerns similar to your's, then the *conditions* approach is your best strategy option.

If your research shows decision-makers always refuse to add conditions of the type your are seeking or the conditions are rarely applied effectively, then your best option is to defeat the project by convincing decision-makers to deny an essential permit-approval. Of course, most situations will lie somewhere between these two extremes.

DEFEATING A FATALLY-FLAWED PROJECT

Some development proposals are so poorly conceived and some sites are so uniquely sensitive that a Win-Win solution simply is not available. In other words, impacts cannot be resolved without making the project unprofitable for the applicant. Examples of these fatally-flawed projects include:

- building a shopping center in a wetland supporting a threatened-endangered species;
- locating a 24/7 big-box store in the middle of a residential neighborhood; or
- siting a landfill next to a school.

How do you know if a project is so fatally-flawed that a win-win solution is not available? Well, if you go through the steps for *Finding A Win-Win Solution*, in *Chapter 37: Negotiating With The Applicant*, without identifying a reliable way to resolve each of your core concerns then a win-win solution is certainly not available from your perspective.

Most of the victories citizens have in defeating fatally-flawed projects are due to political action and secondarily to litigation. Once you demonstrate overwhelming citizen opposition to a project decision-makers will be far more inclined to:

- find a way to withhold an essential permit-approval;
- buy the site from the applicant; or
- find some other way to keep the project from going forward.

Of course, citizen opposition must be based on facts which demonstrate the project poses an undue threat to widely held community values. You must also demonstrate that these facts cause the project to conflict with a specific legal requirement for granting an essential permit-approval. Invariably citizens need the services of an attorney and expert witness testimony to get the facts into a formal record in a way that denial of the permit-approval stands up on appeal. But read on before rushing out to hire an attorney.

Chapter 36: Mobilizing Support For Your Strategy, provides step-by-step guidance on how to greatly increase the number of people contributing volunteer hours, expertise, and dollars to your campaign. As your number of supporters grows, so does your political clout with final decision-makers. Advice is also provided in Chapter 36 on how to raise the funds needed for specific political organizing tactics and legal action. In fact, nothing demonstrates widespread, intense public support for a cause like raising thousands of dollars from the citizens impacted by a fatally-flawed project.

As your base of public support expands you will likely find that both regulatory staff, their agency heads, and elected officials will be more receptive to your concerns and more creative in interpreting existing laws in ways that address your concerns. Advice on working with regulatory staff, agency heads, elected officials, and other final decision-makers is provided in *Chapter 38: Working With Regulatory Staff* and *Chapter 39: Lobbying Final Decision-Makers*.

The project will be moving towards a critical event in the permit-approval process as you continue the effort to expand your base of support, your work with staff continues, and decision-maker lobbying progresses. This critical event may be:

- the start of a comment period;
- a hearing before a local planning commission, a Board of Appeals, the town council; or
- an opportunity to appeal a decision to grant a permit-approval before your concerns are fully resolved.

In most cases, you cannot afford to ignore these critical events. And in most cases you will need an attorney and an expert witness or two if you are to have a decent chance of either conditioning or blocking the permit-approval. There will usually be several - perhaps many - of these critical events. It is unlikely you will have the resources to pursue them all. So you must carefully research all upcoming events then select those which offer the greatest likelihood of success.

Each of these critical events should have been identified through the research described above under *First, Preserve Your Rights*. Using the advice given later in this chapter under *Evaluating Strategy Options for Winning Specific Permits-Approvals*, you must determine which critical event provides you with the best opportunity to resolve your concerns. Of course, you must have an attorney and witnesses on-board and ready to go well in advance of the critical event.

Frequently, the key critical event will be an administrative hearing before a planning commission, a board of adjustments, or a hearing officer. You must begin preparing for this hearing at the earliest possible moment when faced with a fatally-flawed project. I say this because the outcome you will be seeking is to defeat the project by convincing decision-makers to deny an essential permit or approval. To achieve this goal you must prove that the project fails to comply with one or more of the criteria decision-makers are obligated to follow.

When faced with this challenge we identify every aspect of the project which fails to fully comply with any relevant criteria. Usually, our first cut analysis will uncover one or two dozen issues which have the potential to defeat the project. As research continues we'll discover problems with most of the issues. These problems will make a denial of an essential permit or approval unlikely. Our hope always is that at least three or four issues will still be viable come the start of the hearing. We then anticipate that the applicant will come in with revised plans that might negate another issue or two. If we have done our job well then at least one of the issues will still be alive by the end of the hearing. This issue will then provide a basis for the decision-maker to withhold approval for the project. If we have also been successful in helping our clients mobilize widespread support for their position, then a defeat of the fatally-flawed project becomes far more likely if one good issue survives to the end of the hearing.

Occasionally, local zoning ordinances and other applicable laws are so poorly written or out-of-date that they lack the language needed to stop a fatally-flawed project. When this is the case we frequently urge our clients to consider changing the law to provide the necessary authority.

Growth management is a rapidly evolving field. Concepts like *Smart Growth*, *New Urbanism*, and *Low-Impact Development* were in their infancy just a decade ago. Many localities have yet to update their laws to mandate the use of these new approaches. You may find that your local land use laws do not allow decision-makers to deny or even condition a permit to address a specific impact even though a highly-effective Smart Growth or Low-Impact Development technique is available. If staff, agency heads, and elected officials insist that this is the case, then see *Chapter 40: Legal Action*, for advice on how to find an attorney who can verify the lack of authority. If the attorney agrees then see *Chapter 41: Changing the Law*, for advice on how to give decision-makers the necessary authority.

Purchasing the project site is an alternative to changing the law. The site could then be preserved in a natural state in part or in entirety. The site might also be developed in a way that not only preserves, but enhances existing quality of life by creating facilities desired by area residents. Guidance on this strategy option is provided in *Chapter 16: Open Space Preservation*.

A specific permit-approval will frequently provide the best opportunity to defeat a fatally-flawed project. The next section of this chapter, *Evaluating Strategy Options for Winning Specific Permits-Approval*, will explain how to make the most of each opportunity.

If you have any questions regarding how to defeat a fatally-flawed project, then please feel free to contact me at: 1-800-773-4571 or Rklein@ceds.org. There is no charge for answering questions from citizen advocates by phone, provided the question doesn't require research.

EVALUATING STRATEGY OPTIONS FOR WINNING SPECIFIC PERMITS-APPROVALS

In order for project ground-breaking to begin, most applicants must obtain a number of permits and other approvals from the local government as well as regional, state, or federal agencies. These permits-approvals were described in Part II of this book. The strategy options offering you the greatest likelihood of success are largely a function of which of the following permits-approvals the applicant must obtain:

- A. Master plan amendment;
- B. Annexation;
- C. Zoning text (*curative*) amendment;
- D. Rezoning;
- E. Special Exception, Conditional Use Permit, and Special Use Permit;
- F. Variance;
- G. Subdivision & Site Plan; and
- H. Building-Grading Permit.

Few projects will require all of the permits-approvals listed above.

Political vs. Legal Action

There are a few generalizations that can be made about the strategy options which are likely to be successful with respect to the specific permits-approvals listed above. These generalizations are most applicable when considering campaigns emphasizing strategy options based on political versus legal action.

Political Action: This approach utilizes the advice given in *Chapter 36: Mobilizing Support For Your Strategy* to educate at first dozens, then hundreds, maybe thousands of people about the benefits of actively supporting your position. Political action then uses the guidance in *Chapter 39: Lobbying Final Decision-Makers*, to demonstrate to elected and appointed officials that the community will be behind them when they decide in your favor. Political action is most effective when you can demonstrate that you have sought to be fair with the applicant and that your position is well-reasoned and based upon values shared by a large percentage of community residents. Generally, political action is most successful in winning favorable action on four specific permits and approvals: a master plan amendment, annexation, a zoning text amendment, or rezoning. This is because of four factors:

- A. First, the local legislative body is usually the final decision-maker for all four permits-approvals and no other decision-maker is as sensitive to public opinion as a town or county council;
- B. Second, state laws and legal precedents usually give the local legislative body broad discretion in the action taken on these four permits-approvals;
- C. Third, community perception about overall quality of life impacts is particularly relevant to decision-making regarding these four permits-approvals; and
- D. Fourth, citizens tend to have the advantage in the political atmosphere which usually surrounds decision-making on these four permits-approvals.

But it would be a mistake to assume political action alone will always carry the day when any of these four permits-approvals are at issue. While there are many examples of citizens winning campaigns involving these four permits-approvals without professional assistance, the likelihood of victory is enhanced with the assistance of an experienced land use-zoning attorney.

Legal Action: As the phrase implies, legal action entails demonstrating that a project fails to comply with the laws, regulations, and policies governing land use in your area. Legal action requires the assistance of an experienced attorney and frequently one or more expert witnesses.

While no permit-approval process is completely insulated from the effect of community organizing, there are a number where political action alone rarely carries the day. A good example would be a variance. Local regulations usually spell out the legal requirements for granting a variance in detail. Furthermore, the conditions under which a variance can be denied are normally well defined through prior appellate court decisions. While it may be possible to convince a local decision-making body to deny a variance for purely political reasons, the denial will likely be overturned by the courts.

Generally, legal action is critical to the success of winning a favorable decision on a permit-approval which does not come before a local legislative body. This normally includes all of the permits-approvals listed above except the first four. However, in some localities citizens can win a favorable decision from a planning board-commission based primarily upon community sentiments regarding the project. But even in these instances the likelihood of victory is higher with aggressive legal action. Further detail is provided in *Chapter 40: Legal Action*.

Occasionally, legal action inadvertently creates the time required to win in a political arena. For example, let's say existing law does not address a significant project impact yet the current legislative body refuses to amend the law. In fact, they approve the project despite noncompliance with legal requirements which would have resolved other impacts of concern to citizens. The citizens appeal the decision. Project ground-breaking is postponed by the appeal. An election takes place during the two- to three-years required for appeals to run their course through the courts. The pro-development majority on the local legislative body is replaced by pro-growth-management

candidates. These newly elected decision-makers immediately pass a law correcting the flaws in the growth-management process so citizen concerns are addressed. Sometime thereafter, citizens win the appeal when the courts overturn the approval granted by the former legislative body. If the applicant still wishes to pursue the same project then they must reapply but now the new law will force a redesign eliminating the impacts of concern to citizens.

While it might be tempting to initiate legal action to create such a delay, I strongly urge you not to do so. Not only is this unethical but it could expose you to an expensive lawsuit brought by the applicant. However, you should not hesitate to appeal a decision to approve a project which fails to meet legal requirements that would have resolved your core concerns.

Discretionary vs. Nondiscretionary Actions: Another way of determining when to emphasize political or legal action is to assess how much discretion decision-makers have regarding a specific permit-approval. By *discretion* I mean how rigid are the legal criteria and court precedents for when a permit-approval can be conditioned or withheld. For example, the local legislative body frequently has the greatest degree of discretion with respect to:

- the content of a master plan;
- an amendment to a plan;
- a zoning text (*curative*) amendment;
- a rezoning; and
- whether to grant an annexation request.

Political action is generally most effective in carrying the day for these approvals since the decision-maker can condition or deny with a lower likelihood of reversal by the courts.

With other permits-approvals the law and legal precedents grant a lesser degree of discretion to decision-makers. Examples of the *nondiscretionary* permits-approvals would include:

- a subdivision or site plan;
- a special exception, a conditional use permit, or a special use permit;
- a variance or waiver; or
- a building permit.

If an applicant can demonstrate they have complied with the extensive legal requirements which usually exist for each of these approvals, then the decision-making body is obligated to approve or face likely reversal by the courts.

As the degree of discretion declines, so does the need to emphasize legal action over a political approach. This does not mean abandoning political action. As stated frequently throughout this book, the best way to ensure success is to aggressively pursue both political and legal action. The more successful you are in a political arena, the more inclined decision-makers tend to be in interpreting legal requirements in your favor. Conversely, the more you can show that the facts and

the law support your position, the easier it will be for decision-makers to find a way to resolve your concerns.

Again, the preceding advice on when to emphasize political action vs. legal is general. This advice is not applicable to every specific case. You can gain critical insights into which strategy options to employ by researching how decision-makers have evaluated and acted on specific permits-approvals for similar projects in the past.

Identifying the Best Permit-Approval for Resolving Your Concerns

Following are the five steps involved in determining which permit-approval offers you the greatest likelihood of resolving your concerns.

1. Determine how much time remains before each critical event will take place. This will help you plan how to best use your time. It also ensures opportunities to influence decision-making are not missed.
2. Obtain all the documents relevant to the project and your concerns, including applicant submittals, staff comments and correspondence, applicable laws and regulations, policies, planning reports, guidance manuals, and so forth.
3. Review the requirements for each permit-approval to determine which most directly addresses your concerns and whether resolution of each concern is required by law.
4. Review applicant submittals and staff comments-correspondence to determine if your concerns have already been addressed in a way that fully resolves each. If not, then seek to negotiate resolution with staff, decision-makers, or the applicant.
5. If negotiations do not leave you confident that your concerns will be resolved, then research the decision-making history for each permit-approval the applicant must obtain. You will be seeking to determine how likely it is that you can convince those making decisions on each permit-approval to adopt your preferred solution. This research should also indicate the probability that the decision will be upheld on appeal.

If done well, the results of these five steps will show you which permit-approval offers you the best opportunity to resolve your concerns and will reveal many of the specific actions you must pursue to achieve success.

Decision-Making Process & Critical Events

In the section above on *First, Preserve Your Rights*, I urged you to identify all hearing dates, comment periods, appeal deadlines, and other critical events relevant to the project of concern to you. Identifying critical events usually takes but little time. The critical events will usually be described with respect to permit and other approval the project requires. Take the opportunity to ask for details regarding the decision-making process applicable to each permit-approval and how to obtain a copy of all the documents each agency has regarding the project and the process.

If your concerns are narrow, then I urge you to focus on the permit-approval specific to your concerns. For example, let's say you are concerned about an increase in traffic on your residential street. Discuss the following with staff:

- which staff person will have the lead in reviewing the project for traffic impacts;
- what documents has or will the applicant submit which are relevant to increased traffic on your street;
- what policies, laws, or other criteria are applicable to increased traffic on your street;
- how can you obtain a copy of the applicant's submittals along with the relevant policies, laws, or other criteria; and
- what process will the agency use in formulating a position on the issue of increased traffic on your street, which would likely be:
 - the lead staff person reviews applicant submittals for compliance;
 - if significant conflicts are found then the lead staff person drafts a set of comments;
 - the comments are reviewed by the lead's superior who then authorizes forwarding the comments letter to the applicant; and
 - once all comments are addressed the lead staff person documents in writing that the project meets all policies, laws, or other criteria are applicable to traffic impacts.

There are two critical event in the process described above. First, when the lead staff person drafts their initial comments. Second, when they document that all requirements have been met. You must begin working with the lead staff person before the first critical event occurs. Hopefully, once the lead hears of your specific concern they will look for a way to resolve the impact within the authority granted by the applicable policies, laws, or other criteria. Guidance is provided in *Chapter 38: Working with Regulatory Staff* on how to get the most out of your discussions with agency staff.

A permit-approval like a master plan amendment or annexation may have a very complicated and lengthy process with numerous critical events. To maximize the likelihood of a favorable outcome you must identify every step in the process and look for ways to influence decision-making at every step, particularly prior to critical events. Usually citizens wait until the last critical event - a public hearing - which occurs after all the deals and big decisions have been made. Most of the failures citizens experience are due to this tendency to begin too late in the process; thus the need to always aggressively pursue smart solutions.

Obtain All Relevant Documents

Much of the information needed to determine which permits-approvals offer you the best chance of success will be found in the applicant's submittals, comments generated by various agencies, and other documents. Usually, the lead agency will maintain a project file containing all of these documents.

Most local governments will allow citizens to review the project file with little fuss. Some will require that you make an appointment or even ask you to submit a written request. Be sure to ask the lead project reviewer how to gain access to the file during the research described under *First, Preserve Your Rights* and *Decision-Making Process & Critical Events* above.

When I review a project file I seek to obtain a copy of every piece of paper in the file. For obvious reasons, staff prefer that I not ask for a copy of everything. Yet, what seems worthless to staff can be very important to citizens. The seemingly worthless fax cover sheet is a good example. Every time I come across a fax cover sheet I check the file to see if the documents listed on the sheet are present. It is not uncommon for documents to be sitting on a reviewer desk and checking fax cover sheets is a good way to learn of these missing items. Of course, I also ask the lead reviewer if they have any documents which haven't been placed in the file. Some jurisdictions have a policy which states that a document only becomes available to the public after it has been reviewed by staff. When we question this policy we frequently find no legal basis and the documents are subsequently released.

I usually bring a portable scanner, a laptop computer, and a digital camera when I review a file. I'll run every letter- or legal-size piece of paper through the scanner then store the image on a laptop connected to the scanner. With the camera I'll take a high-resolution digital image of every document that won't fit through the scanner.

In some cases those who maintain the file will not allow the use of a scanner and camera. Instead, they ask that I mark the documents I want to copy with post-its and paper clips. When this is the case I make a list identifying every document I marked for copy. The list includes the following: the document date, type of document (letter, report, memo, email, etc.), the author of the document, to whom it was addressed, the title or subject of the document, and the number of pages. When I receive the copies, which is usually a day or two after reviewing the file, I compare my list to what I actually received. It is normal for a few documents to be missing because a post-it came off or the person running the copies just overlooked something. I almost always receive the missing documents after making a follow-up request.

Getting copies of plans can be a problem in small towns or rural counties where agencies lack the equipment to reproduce documents larger than legal size. Larger towns and urban counties usually have the necessary equipment. But when the agency cannot reproduce oversized documents I try the following alternatives:

- ask if I can take a digital photo of the plans;
- ask if I can run the plans out to a printer with the necessary equipment; or
- when all else fails I copy plans in letter-size sections, making certain each section overlaps, then I paste them all together to make a full-size copy of the original plan.

After I finish going through the file, I'll ask the lead reviewer what laws, regulations, planning reports, guidance manual, policy documents, or other materials contain the criteria relevant to the project and the concerns of our clients. I'll also ask how each can be obtained. Frequently these days everything is available online. If not, I'll purchase a paper copy of each.

After I obtain all the relevant documents I run the letter- and legal-size items through a scanner and convert everything to searchable text using Adobe or other software. Having everything in searchable format makes the review of these documents far easier. For example, this book contains nearly 90,000 words. It is also posted on the CEDS website in a searchable-text format. So if you are interested in a particular topic but didn't see it in the table of contents and you don't want to read the entire book, you can call up a text search tool, type in a keyword, then hit enter to see every place in the book where the keyword appears. You can do the same for all project documents after converting them to searchable text. Be certain to convert laws, guidance manuals, policies, and all other documents to searchable text as well.

Linking Regulatory Requirements to Resolution of Your Core Concerns

After you have obtained all the documents relevant to your concerns, the next step is to research the requirements relevant to each permit-approval the applicant must obtain. The goal is to identify those permits-approvals where regulations or policies require that your concerns be resolved or that the project be denied an essential permit-approval.

I assume that you are sitting before a computer and you are looking at an online version of applicable ordinances-regulations or those that you scanned from paper copies and converted to searchable text. If not, then open up a paper copy.

To simplify the language of this section I'll refer to ordinances and regulations as *ordinance*, as in the *Zoning Ordinance of Anytown, USA*. To make the following suggestions easier to understand, let's assume your core concern is impact to a wetland and you know that the local Wetland Board will hold a hearing in two weeks. In fact, the Board hearing is your first opportunity to participate in the decision-making process with respect to wetland impacts.

There should be a section in the local ordinance specific to the Wetland Board. This section will set forth:

- the purpose of the Board;
- the number of members;
- how members are appointed to the Board and their terms (duration) of office;
- the scope of the Board's authority;
- what wetland related activities must be approved by the Board;
- what information must be submitted to the Board;

- the criteria for granting approval;
- public participation opportunities including required public notice and hearing(s);
- how the Board must go about making a decision; and
- how a decision by the Board can be appealed.

To find this section in the ordinance first look through the table of contents or the index to see if there is a reference to the *Wetland Board* or just *wetlands*. If you cannot find it in either location and you have the ordinance on your computer screen, then use the search function to identify all occurrences of the keyword: *wetland*. If you still cannot find a reference to wetlands then look for a section on environment, where requirements relevant to wetlands may occur. If references to wetlands still appear absent then contact Wetland Board staff or the project reviewer for the lead agency to find out how to obtain a copy of the laws and policies under which the Board operates. If you have taken all of these steps and are still at a loss then contact me at: 1-800-773-4571 or Rklein@ceds.org.

Hopefully, the applicant's submittal to the Wetland Board were among the documents you already have, along with all other relevant materials. There should be an application, a letter, or a report setting forth what wetland impacts are proposed and why the applicant feels the Board should grant approval. Compare the proposed impacts and justifications with the criteria contained in the ordinance to see if the harm done to the wetland is within the allowed scope and to verify that all specific requirements are met.

Approval Criteria: The criteria for granting approval are usually the most important section of a local ordinance. These criteria will set forth the requirements that must be met for the Board to approve wetland impacts. Following is an example of how the criteria may appear in the ordinance:

§101.2 Wetland Approval Criteria.

- A. The Wetland Board shall withhold approval unless it finds that the proposed activity will not:*
- 1) adversely affect a threatened or endangered species;*
 - 2) result in a net increase in pollution loadings, or*
 - 3) other wise degrade wetland ecosystems.*

The guidance presented in Part I of this book will help you determine if approval criteria have been met.

It is critical that your testimony before the Board very clearly prove why the criteria have not been met. It must not be generic. For example, let's say one of the criteria reads:

The applicant shall demonstrate that the project will not degrade wetland ecosystems,

Following are examples of the generic and specific testimony that might typically be offered with respect to this criteria:

Generic: A recent government study showed that development is degrading the ecosystem of hundreds of acres of wetlands each year throughout your state. You argue that since the proposed project is “development” too it will cause wetland degradation too. Therefore the Board should deny approval.

Specific: You begin your testimony by citing the same study referenced above but add that the greatest damage has been, say, among a type of wetland known as a *fen*²³². You then cite the portions of the study which show that fens are not only uniquely important but also highly-sensitive to the effects of nearby development. Next, you point to a portion of the study which shows that fen-type wetland ecosystems begin to degrade when there is an average of one house for every eight-acres of land in the watershed. Finally, you provide the Board with a map showing the watershed of the fen, transfer the watershed boundary to the applicant’s plan, and point out that the project will increase the housing density in the watershed from the current one per 20 acres to one house per three acres after development. Therefore, you conclude, the project will degrade the wetland ecosystem and the Board is bound by their own criteria to deny approval.

The specific testimony presented above has a far greater likelihood of not only convincing the Board to deny approval but of also getting facts into the record which would prompt the courts to uphold the denial if the applicant appeals. However, most savvy applicant attorneys will not let this testimony stand alone. Instead, they will put on a rebuttal witness who will likely have better credentials (degrees, training, and experience) in wetland ecology and will attempt to explain why the project will not harm the fen. As will be explained in *Chapter 40: Legal Action*, the better credentials of the applicant’s *expert* witness will likely, but not always, trump your testimony as a *lay* witness. The end result will be court reversal if the Board denies approval based upon your testimony alone.

Custom & Practice: In most localities a *custom and practice* has evolved as to how regulatory requirements are interpreted. Even highly-respected wetland experts can disagree on how to determine if a specific requirement has been met. *Custom and practice* tends to govern how a requirement is interpreted and, therefore, how to judge if compliance has been achieved.

²³² The U.S. Environmental Protection Agency defines a fen as: *Waterlogged, spongy ground containing alkaline decaying vegetation, characterized by reeds, that may develop into peat. It sometimes occurs in the sinkholes of karst region.*

During your discussions with staff it is important to ask how each regulatory requirement is interpreted. But keep in mind that just because things have always been done in a certain way does not mean that way is right. We've had a number of cases where we showed custom and practice was at odds with the intent of an ordinance. This allowed our clients to succeed in convincing the decision-making body to deny approval and adopt a new custom and practice. This scenario tends to unfold in local jurisdictions that have become very applicant oriented. Over time staff learn that their recommendations are always rejected when they favor the community or environment over the interests of the property owner. So staff try to find a point where some community-environmental protection is achieved without unduly risking rejection by decision-makers. It is this type of custom and practice which is most easily overturned.

As you are reviewing the ordinance determine if the Wetland Board is the final decision-maker or simply makes a recommendation to a planning commission or some other body. This information should be contained in the portion of the ordinance setting forth the authority of the Board or in the portion on what action the Board may take on an application. If the Wetland Board simply recommends then use the advice given below for researching how consistently the final decision-maker follows the Board's recommendation. If the final decision-maker almost always adopts the recommendation then winning Board support becomes critical to success. If the Board recommendation is rarely followed then perhaps your limited resources should be focused elsewhere.

The process described above should be completed for each permit-approval relevant to your concerns. Continuing with the wetland example, I would look next at portions of the ordinance pertaining to erosion and sediment control, since excessive mud pollution during the construction phase could devastate the wetland. Next, I would look at post-construction stormwater management. Improperly controlled runoff has destroyed thousands of acres of wetlands.

After researching the ordinance to determine if the project meets applicable criteria, the next step is to review the history for each permit-approval where the ordinance provides decision-makers with the authority to address your concerns. This history will provide critical insight into whether a decision-maker is likely to approve, condition, or deny the permit-approval based upon facts similar to those applicable to your case. The next section of this book describes how to carry out research into decision-making history.

Researching Decision-Making History

Does your local Board of Appeals have a history of granting every variance application they receive? Do the courts uphold the variance approval every time someone appeals the decision of the Board? If the answer to both questions is yes, then opposing a variance is probably not a very good use of your limited resources.

Does the local Planning Commission have a record for conditioning or denying preliminary plans for projects which are strongly opposed (for valid reasons) by the community? Were these decisions upheld by the courts? A yes to both questions makes the planning commission hearing on this

permit-approval a top priority for use of your limited resources, provided further research shows your case possesses the same elements which resulted in previous conditioning-denials without reversal by the courts.

In some localities you can research decision-making history online. All land use decisions are posted on a website structured so you can search for cases involving specific permits-approvals or project types. But creating and maintaining such a complete online database consumes considerable resources and not all local jurisdictions have done so. A number of states post appellate court decisions on their websites, so researching the history of appeals is a bit easier. However, only *reported* appellate decisions may be posted. In Maryland, only 12% to 15% of all appellate court decisions are reported.

If online decisions are not available in your area, then try the old-fashion approach - visiting offices, skimming through lots of records, and asking questions. Actually, I suggest beginning with questions. Folks who may know the decision-making history of local Boards, commissions, the legislative body, or other decision-makers include:

- planning and zoning staff, including the agency director;
- staff to a Board, commission, or legislative body;
- current or former members of a Board, commission, or legislative body;
- other elected officials who interact with the body, such as a State delegate or senator;
- citizen activists who monitor a decision-making body; and
- attorneys who frequently appear before the body.

Using the guidance provided in *Chapter 38: Working with Regulatory Staff* talk with each of these people to get their insights on how the decision-making body has acted in the past on the permits-approvals relevant to the project of concern to you. If you have a Win-Win solution or other conditions you would like added to a permit-approval then ask if the decision-making body:

- a) has the legal authority to impose such a condition,
- b) under what circumstances have they done so in the past, and
- c) has there been any problem enforcing the condition at previously approved development sites?

If you feel a Win-Win solution is not available and a permit-approval should be denied, then ask if the decision-making body has done this in the past and under what circumstances might they withhold the permit-approval for the project of concern to you?

If you learn of specific cases which may serve as a precedent for your's then ask how to get a copy of the written decision, assuming one exists, a transcript, or minutes from the hearing where the

decision was made. These documents may contain important information about the facts and legal issues which prompted the body to reach their decision.

If your conversations turn up little useful information then consider reviewing the records of the decision-making body. Frequently, those serving as staff to a Board or Commission will know of prior cases similar to your's. If not then ask if a paper or computer record of prior decisions is kept. The record may show the name of the parties, the permit-approval at issue, and the decision. If you are fortunate the record may also show whether the decision was appealed along with the outcome.

If such a record does not exist then you might ask to look at the minutes for past meetings-hearings in hopes of identifying similar cases. Note the cases which are most relevant to your's then ask if you can get a copy of the decision, if one exists, or any other written record detailing the basis for the decision.

Be judicious in the number of documents you request. Staff cooperation is critical and avoid souring your relationship by asking for too many documents. Usually, I ask for copies of no more than three- to six-decisions. If you come across cases that are recent and nearly identical to your's then there may be value in asking to look at the case file. The file may contain a wealth of information on how the decision-making body views various facts and legal issues.

If you identify decisions similar to your's then ask if they were appealed. Usually the person who helped you find a case will know if the decision was appealed and which body heard the appeal. Contact this body to learn if the decision was upheld, reversed, or remanded on appeal. Try to obtain a copy of the decision regardless of which way it went since it likely contains valuable information. Next, research whether this decision was appealed and so on until you reach the end of the appeals history for each specific case.

After completing this research see if citizens or a citizen group was involved in the case as protestants, opponents, or appellants. If they were then a conversation with these people may uncover critical information about mistakes to avoid, things that worked well for them, which attorney or expert witnesses they used and how well each did their job, the amount of funds they had to raise to win their case, and so on.

Finally, do not overlook the role of staff in influencing decision-making. In many jurisdictions, particularly those with a large number of professionals, the analysis provided by staff tends to serve as the primary basis for facts considered by decision-makers. Frequently, the decision-making body will closely adhere to staff recommendations.

If your decision-makers rely heavily on their recommendations, then every effort should be made to educate staff about your concerns and your preferred solution. Again, advice on this topic is provided in *Chapter 38: Working with Regulatory Staff*. But the point here is to be sure to research how closely the final decision-maker follows staff recommendations.

If everything goes well, this research should tell you:

1. Whether the decision-making body has ever taken the action you are hoping for on a specific permit-approval;
2. What facts and legal issues the body considered most relevant in reaching a decision;
3. How important it is to win the support of staff;
4. The importance of political action to victory;
5. Whether an attorney and expert witness(s) are needed and, if so, who does the best job for citizens.
6. Was the decision upheld on appeal; and
7. What it might cost to win a similar victory.

This research should allow you to determine which strategy option offers the greatest likelihood of winning a favorable decision on each specific permit-approval. The research should also reveal the relative value of political and legal action.

There may be some situations where neither legal nor political action is likely to produce the desired outcome, particularly if your goal is to defeat a fatally-flawed project. This is sometimes the case with *By-Right* projects where only a site plan approval is required along with a building and grading permit. If the project fully complies with all applicable requirements then the decision-making body has no choice but to grant approval, which will surely be upheld if appealed to the courts. In this situation and other similarly difficult scenarios, consider strategy options such as those described in: *Chapter 41: Changing the Law* and *Chapter 16: Open Space Preservation*.

On rare occasions citizens are faced with simply having no good strategy option. When this happens your only choice may be to go for a *Hail, Mary* and hope you get lucky by winning where no one has done so before. But frankly, I find these acts of desperation are more a result of less than thorough research by:

- citizens attempting to do too many things at once or lacking the necessary experience;
- hiring a professional²³³ to do the research, but putting them on too tight a budget, which means too little time for research; or

²³³ Professionals who can do this research include [CEDS](http://www.ceds.org), land planners, some civil engineers, and land-use or zoning attorneys with extensive experience helping citizens. If you'd like to hire such a professional contact [CEDS](mailto:help@ceds.org) at help@ceds.org or 1-800-773-4571.

- using a professional with too little experience in winning land use cases on behalf of citizens.

If you feel you have thoroughly researched your options but none appears promising, then please contact me at: 1-800-773-4571 or Rklein@ceds.org. We can discuss the problem to see if we can find a better option. As always, I do not charge citizen advocates for this advice by phone. Alternatively, if you feel the research described above requires more time than you have, consider hiring CEDS do this research for you. Further detail on this service can be found at the CEDS *Initial Strategy Analysis* webpage: <http://www.ceds.org/strategy.html>.

Following are links to two examples of the type of decision-making history analysis needed to maximize the likelihood that citizens will win a campaign:

A Citizens Perspective on the Baltimore County Development Review Process

[http://www.ceds.org/BaltimoreCounty/A Citizens Perspective on the Baltimore County Development Review Process.pdf](http://www.ceds.org/BaltimoreCounty/A%20Citizens%20Perspective%20on%20the%20Baltimore%20County%20Development%20Review%20Process.pdf)

This analysis consists of all development proposals considered by Baltimore County, MD decision-makers over a three-year period. The analysis shows how citizens can stop truly bad development projects and win changes to resolve concerns about fundamentally sound proposals.

Preserving Cul-De-Sac Streets from Becoming Through Roads

[http://www.ceds.org/BaltimoreCounty/Cul-De-Sac Streets.pdf](http://www.ceds.org/BaltimoreCounty/Cul-De-Sac%20Streets.pdf).

The Cul-De-Sac Street analysis provides guidance on how to win a specific issue: preventing the conversion of a dead-end (cul-de-sac) residential street into a through road.

WINNING BETTER GROWTH MANAGEMENT OVERALL WHILE GRAPPLING WITH ONE PROJECT
Chances are the project threatening your interests is a reflection of poor growth management on the part of your local government. After all, if a full set of responsible growth management measures were in place and local decision-makers were committed to upholding these measures, a fatally-flawed project would never get past the earliest stage of the review process. Consider then the benefits of making minor adjustments to your effort which will expand public support for instituting responsible growth management. Ultimately, the single most important ingredient is the election of decision-makers committed to responsible growth management. So if you are in the midst of the campaign season take a look at who is running for elective office in your area. Use the guidance in Chapter 42 to identify candidates who are committed to responsible growth management. This chapter also provides advice on how to help your supporters appreciate the benefits of voting for responsible growth management candidates into office.

There are also many examples of battles over a single flawed project changing the way growth is managed by incumbent decision-makers. Perhaps the greatest example is the management scheme known as *Smart Growth*.

There is a lot of argument about who founded Smart Growth and where. I know for a fact that it came about because of an edge-city proposed in the early 1990s for a 2,000-acre site on the Potomac, just downriver of Washington, D.C. The applicant called this project Chapmans Landing. To the citizens who cherished this area, it was Chapmans Forest. CEDS was part of an impressive network of individuals and citizen groups who lobbied local and state government to preserve this uniquely important area. Today the area is known as [Chapman State Forest & Park](#).

Chapmans Forest became the poster-child for the many flaws in the old approach to growth management. Literally tens of thousands of Maryland voters had lobbied then Governor Parris Glendening to save Chapman Forest. In 1997, after purchasing the 2,000-acre site, the Governor used the momentum created by the Chapmans Forest campaign to win passage of five pieces of legislation in the Maryland General Assembly. These five new laws became the core of what is known today as *Smart Growth*.

For guidance on how your battle over a single project might lead to the adoption of responsible growth management laws in your area see *Chapter 41: Changing The Law*.

HOW CEDS CAN HELP YOU FIND THE BEST STRATEGY

If you have any questions regarding how to carry out the research recommended in this chapter, then please feel free to contact me at: 1-800-773-4571 or Rklein@ceds.org. I do not charge for answering questions from citizen advocates by phone. Our conversation will be far more productive if you attempt to complete the research first or at least read through this chapter before calling. Its much easier to answer specific questions about a particular research step. Its very frustrating to essentially repeat the guidance given in this chapter.

If you feel the research described above requires more time then you have, consider hiring CEDS do this research for you. Further detail on this service can be found at the CEDS *Initial Strategy Analysis* webpage: <http://www.ceds.org/strategy.html>

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