

# Drafting Land Use Findings

by Gary A. Kovacic, Esq., and Mary L. McMaster, Esq.

Three recent trends are greatly increasing the importance of findings in land use decision making. The first of these trends is increased judicial scrutiny of land use decisions. The United States Supreme Court decision in *Nollan v. The California Coastal Commission*, which largely turned on the Court's inability to see an asserted connection between a required condition and a proposed project, illustrates the key role that findings can play. "Nollan..."

The second trend leading to the increased importance of findings is the expanding number and variety of factors that can, and sometimes must, be taken into account in land use decision making. Many courts and legislatures across the country are acknowledging and requiring consideration of a variety of impacts created by local land use decisions. Impacts related to such concerns as regional housing availability, wildlife habitat, and aesthetics, which in the past were not considered important in local land use decision making, are becoming increasingly significant considerations.

This trend can create two types of problems for local planning officials. Officials may fail to take into account factors that, in the past, were not important, but that now must be considered and discussed in their findings. Alternatively, officials can be led astray by the large number of impacts potentially involved in their decision. This may cause them to neglect to specify in their findings that their decision was based on the legally required considerations — not on the myriad of other possibly relevant, but not legally sufficient, factors that may have been discussed in the hearing on the case.

Increased community sophistication is the third trend that makes the drafting of good findings more important than ever before. As various groups and individuals

become more knowledgeable of the legal requirements involved in land use decision making, they become increasingly able to identify and make use of land use findings (or the absence of them) to support their positions, and to judicially challenge those local decisions.

The following guidelines are intended to help local decision makers draft findings that will survive a court challenge. The emphasis is on how to avoid making some common mistakes.

“JUDGES WILL NOT ALWAYS GIVE THE COMMISSION MEMBERS THE BENEFIT OF THE DOUBT, AND JUDGES ARE GENERALLY NOT SYMPATHETIC WHEN DECISIONS ARE AMBIGUOUS OR INCOMPREHENSIBLE.”

1. *State all assumptions.* One of the easiest “findings pitfalls” for local planning officials to fall into is to rely on unstated assumptions or to forget to articulate all of the logical links in the decision making process. For example, every member of a planning commission may know that the existing traffic on a particular road is bad, and will be made worse by a proposed development. However, if that observation is not explicitly stated in the commission's written decision, it will not be considered by a court reviewing the decision. For particularly complex decisions, it may be helpful for one of the commissioners, or a staff member, to chart out the logic of the commission's decision and to make sure

that each piece of evidence and each logical link has been articulated in the findings.

2. *Whenever a land use decision involves a condition, make sure there is a clear logical link articulated between the condition being imposed and the impacts of the project.* A key factor in the *Nollan* decision was the Supreme Court's inability to see the “nexus” or link that the California Coastal Commission asserted existed between the condition that was being imposed upon the property owner and the environmental impacts of the project. Findings should clearly articulate the connection between the burdens of a project and the conditions being imposed.

3. *If a project has been modified since findings for it were written, make sure that the modifications will not necessitate new or revised findings.* This issue comes up most frequently in states with environmental review requirements. Modifications may be required of a project to mitigate environmental impacts. However, those modifications themselves may create new impacts. Although a new environmental review may not be required, the commission's actions may be strengthened by the addition of a new finding on the new or modified impact. Then, if the decision is judicially challenged, there will be a record of the commission's consideration of that impact. Developer initiated modifications also can call for new findings where they change existing impacts or create new ones.

When significant changes to a project are made after findings have been drafted, it's a good idea for the commission or board to step back and determine whether there is a need for additional findings, or revisions to existing findings.

4. *Use statutory requirements as guidelines for your findings.* If a state statute or local code or regulation requires specific



## The Nollan Case

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Nollans sought a permit from the California Coastal Commission to tear down their beachfront bungalow and replace it with a larger home. The Commission conditioned approval of the Nollan's plans on a grant of a public easement across their property. The United States Supreme Court struck down the easement requirement on the grounds that there was not a sufficient "nexus," or connection, between the easement requirement and the actual impacts of the project the Nollans were proposing. The *Nollan* decision reinforces the importance in the local land use decision of findings which clearly explain the relationship between the proposed development and any conditions being imposed.

### Findings in Sanskrit:

Avoid the mistake made by the drafters of findings supporting an order of the Interstate Commerce Commission of which Supreme Court Justice Black wrote: "I am compelled to say that the Commission could have informed me just as well if it had written its so-called findings in ancient Sanskrit." Dissenting, in *Chicago & E.I.R.R. v. United States*, (1963) 375 U.S. 150, 154.

► Gary A. Kovacic and Mary L. McMaster are attorneys with the firm of Sullivan, Workman & Dee in Los Angeles. Their practice focuses on land use and eminent domain litigation. Both are members of the California bar, and are also members of the American Planning Association. Mr. Kovacic served as a planning commissioner for the City of Arcadia, California between 1984 and 1987, and has lectured at the American Planning Association's Zoning Institute. Ms. McMaster has a Master's in urban planning from UCLA, and served as an editor of the *Ecology Law Quarterly* while at the University of California, Berkeley, Law School.

findings to support a local land use decision, make sure your findings meet those requirements. Check the applicable statute or regulation to confirm that all necessary considerations are addressed both at the hearing, and in your findings.

Requirements for findings on newly emerging topics such as regional impacts and new environmental considerations are frequently coming into existence. Your legal counsel or planning staff member should monitor those developments and keep you informed of them.

5. *Avoid findings that merely restate the law.* Although it is important to specifically base findings on statutory provisions, you must do more than merely restate those provisions. Another easy trap to fall into is to simply quote the language from the relevant statute and state that the conditions of that statute have, or have not, been met without actually applying the specific facts of the decision to that statute or regulation. Yet, one of the key factors that a court reviewing a land use decision will look for is a reasoned application of the applicable statute or regulation to the specific facts of the case before it.

For example, don't drafting findings that simply state that: "a variance should be granted because the landowner would suffer a unique hardship under the general zoning regulations." Instead, include an application of the facts such as "a variance must be granted because the landowner would suffer a unique hardship under the general zoning regulations *based on the fact that* the lot is irregularly shaped (or whatever other hardship factors exist), and application of the general zoning will not allow for construction on a large enough portion of the lot to make development feasible." Depending on the applicable laws and regulations, findings on this issue usually must also explain how the lot receiving the variance differs from other lots that are similarly zoned.

6. *Put your findings in clear and understandable language.* Although judges are usually more tolerant of "legalese" than they are of "plannerese," they generally prefer simple English. It is true that findings often need to incorporate some statutory language as discussed above. However, the language describing the decision making process should be clear enough that the assumptions and the steps involved can be easily understood and followed. If findings are too obscure to follow they may not provide the logical support required. Judges will not always give the commission members the benefit of the doubt, and judges are generally not sympathetic when decisions are ambiguous or incomprehensible. 🔍 "Findings..."

7. *Suspect Classes.* Land use appeals sometimes allege that a particular class of people has been discriminated against in the challenged land use decision. Local agencies should carefully prepare decisions that may be challenged as discriminatory—and discuss the decision before it is adopted with their municipal or county attorney. The findings supporting a decision upon which this allegation may be made, should make it clear that the decision was not based on race or class.

#### SUMMING UP:

Courts are generally deferential towards local land use decisions so long as there are adequate findings supporting those decisions. Adequate findings are findings that clearly show that the board or commission considered the required factors and that the agency based its decision, in a reasoned way, on legally required or permissible considerations.