

LAFCO Litigation: A Litigator's Perspective

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The Presenter

- Risk Management
- Preparing for Litigation
- Defending Litigation
 - In the Trial Court
 - In the Appellate Courts
- How Long Does This All Take?
- Are There Alternatives?

Agenda

- Include a good indemnity agreement in your application form
- Bind both the applicant agency and the developer
- Consider whether separate counsel are required for the applicant agency and LAFCO

Risk Management: Indemnity Agreements

- Always tender claims to your risk pool or insurer.
- While land use fights are rarely covered, it is far better to ask and get denied than to explain why you did not.
- SLO LAFCO got coverage because a civil rights claim was stated — even though that claim was not very persuasive.

Risk Management: Insurance

- Any decision might be the subject of litigation, so it is a good idea to do thorough reports and make good findings supported by record evidence as a routine practice.
- Still, the riskier projects tend to identify themselves
- Talk to your counsel early and often about those
- Make a good record

Preparation for Litigation

- What Claims are Most Common?
 - CEQA
 - Cortese Knox Herzberg
 - Civil Rights Claims
 - Public Records Act
 - Brown Act
 - Political Reform Act and Other Conflict Laws

Preparation for Litigation

- Most common claims seek a writ of mandate
- Such cases are reviewed on your administrative record
- The standard of review is more deferential under CKH and CEQA than on civil rights claims or the PRA or Brown Acts

Preparation for Litigation

What goes in the administrative record?

- Everything the Commission saw
- Everything participants in the hearing submitted
- Background information referenced in materials the Commission saw or the participants submitted
- Materials submitted on reconsideration

Preparation for Litigation

- Record examples

- City and County general plans referenced in LAFCO staff report

- *City of Santa Cruz v. Santa Cruz LAFCO* (1978) 76 Cal.App.3d 381

- Materials submitted by project opponent criticizing EIR

- *Consolidated Irr. Dist. v. City of Selma* (2012) 204 Cal.App.4th 187

Preparation for Litigation

- CKH Standard of Review
 - The standard is substantial evidence: was there any meaningful evidence before LAFCO to support each finding
 - Absence of procedural error
 - Absence of fraud or prejudicial abuse of discretion
- CEQA Standard of review
 - Substantial Evidence
 - Procedural Error
 - Prejudice

Preparation for Litigation

- Thus, preventing litigation can be summarized as
 - Avoid procedural error
 - Ensure there is substantial evidence to support every required finding
- Common procedural errors
 - Notice
 - Making all the findings and tying findings to evidence
 - Allowing a fair hearing, avoiding bias and conflicts of interest

Preparation for Litigation

- **First Steps**

- Select Counsel
- Consider joint defense and confidentiality agreements among multiple parties or counsel on the same “side” of the case
- Consider whether separate counsel are needed for LAFCO and the applicant or affected agency
- Be careful about litigating in the media
- Keep your Commission informed

Defending Litigation

- Common responses to complaints / petitions
 - SLAPP motion
 - Motion to strike
 - Demurrer
 - Answer

Defending Litigation

- Litigation of Writs is typically limited to your record
 - *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559
 - Very limited exceptions
 - Can be waived; don't do it!
- Ordinary civil cases allow discovery which is a subject unto itself, but expensive in both time and money

Defending Litigation

- Prepare and Certify the Record
 - Useful to discuss it with the other side to avoid motions to strike or augment
 - If agreement cannot be reached, such motions may be necessary
- Negotiate a briefing schedule and page limit extensions
 - Standard page and time limits are rarely workable for these cases

Defending Litigation

- Briefing
- Argument
- Resolution of any non-writ claims
- Post-judgment issues
 - Reconsideration, New Trial, JNOV
 - Attorneys' Fees
 - Appeal

Defending Litigation

- Deadline to Appeal is short and can't be fixed if you miss it; typically 60 days after notice of entry of judgment
- Once timely appeal is filed, most other deadlines are gentle and flexible

Appellate Litigation

- Briefing
 - Appellant's Opening Brief
 - Respondent's Brief
 - Reply Brief
 - Amicus Briefing
 - No deadline in DCA, but wise to file within 30 days of last reply brief
 - Cross-Appeals

Appellate Litigation

- Pros and Cons of Amicus Participation
- Cases are won on briefs, typically, but argument can be helpful
- Supreme Court review
- Attorneys' Fees on Appeal

Appellate Litigation

- Trial court litigation of a writ is relatively fast – 6 to 9 months in most courts
- Appellate litigation is usually about 18 months from start to finish, but can be faster or slower depending on the Court of Appeal
- Supreme Court review is decided 60 – 90 days after the DCA opinion
- If review is granted, Supreme Court takes a year or two, and sometimes three

How long does this all take?

- Settlement
- Mediation
 - Before litigation
 - In the trial court
 - On Appeal
- Alternative Dispute Resolution

Are there any alternatives?

- Questions?