

Where the Buck Stops:

A Guide to the Local Government Development Approvals Process



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INTRODUCTION

This guide is designed to help citizens, community groups and labor organizations understand the process by which their local governments make decisions on new development. Our primary goal is to help you ensure that new, large-scale development projects coming to your community benefit the people that live and work there. This can occur through Community Benefits Agreements or other mechanisms that specifically address community needs and reduce the negative outcomes of building large-scale projects.

This guide is not designed to give you a comprehensive overview of urban planning or land use development law. It is a hands-on manual that will narrowly focus you on the process that your local government uses to approve projects proposed by private developers. It does this by helping you frame a set of questions for you to learn how things work in your city, county and state. Because state and local governments planning laws vary so greatly, you will probably find that not everything fits neatly into our guide, but it will, at a minimum, give you a basic set of tools to improve your effectiveness at winning community benefits.

THE BIG PICTURE

Why Learn About the Approvals Process?

- Knowing the approvals process can't win your campaign for you, but not knowing could make you lose.
- Fully understanding the process helps you maximize strategic opportunities for influencing the outcomes.
- Public ignorance of the approvals process is routinely taken advantage of to push projects through by project proponents.

Learn the Framework, Then the Details

In order to effectively influence the development approvals process, it is very helpful to put all of the decisions and types of approvals into a conceptual framework. This includes:

- 1) where local governments get the legal authority to make land use decisions,
- 2) the types of approvals local governments make to allow a developer to build a project and
- 3) how the legal authority translates into who makes a decision.

Unfortunately, there is no simple guide to land use approvals that we can all use for our local governments. Not only does every city and town have a unique way of making approvals, every state has a different set of enabling laws that give cities the right to set up those approvals.

The good news is, the most important things to understand can be learned fairly quickly, such as who has final decision authority over a zoning change or which official bodies have to sign off on a project. Also, there is a general framework for land use approvals that most cities share in common.¹ After learning the basics, you can learn the nitty-gritty details and legal nuances as you campaign for a community benefits agreement or otherwise change the outcomes of specific projects.

¹ A note on the term “land use.” Land use refers to how private and public properties are put into use by their owners. This includes not only what activities are allowed to take place on that property, such as retail, housing or education, but the shape of any improvements made to the property, such as buildings, parking lots and open space. In the U.S., local and state governments have the power to regulate land use in order to ensure the health and welfare of their residents.

A note on the use of the term “city.” We generally use the term local government to describe the kind of autonomous jurisdiction that will have land use authority over projects you care about. Local governments include a broad range of jurisdictions in various states: cities, towns, counties (unincorporated areas), villages, townships, boroughs, etc. However, we sometimes use the word city to refer to all types of local governments.

A Framework for Understanding the Approvals Process

You don't need to know the technical details of the following framework in order to organize a coalition, hold press conferences or talk to your elected officials. However, it is very useful as you go out and learn in practice how your local government makes approvals decisions and fit in the pieces to give you a whole picture.

Legal Authority

Local governments receive the power to regulate land use and play an active role in how a community is shaped from their state government. In fact, the very existence of cities, towns and counties is typically granted by state constitutions. However, before you crack open a municipal code to see what rules your local elected officials have made, you should understand that three entities have controlling power over land use decisions:

1. State & Federal constitutions
2. State planning laws and regulations
3. State and Federal court cases that interpret the U.S. Constitution and the state laws

Don't panic! You don't need to run out and read state code and all the precedent-setting court cases. The key here is to understand that although local governments have autonomy to make decisions, the buck stops at the U.S. Constitution and at your state laws and constitutions.

The U.S. Constitution does explicitly discuss land use issues, but the right to due process and private property are central to what government can and cannot do in regulating land use. State Constitutions matter because they establish the existence of local governments – in a sense, they are an extension of state government. They grant local governments certain “police powers,” which are not just the ability to hire police and enforce criminal law, but to pass laws

and regulations to ensure the health and welfare of their residents. Land use regulation falls under one of their police powers.²

States can also adopt minimum requirements for local government land use regulation. For example, state planning codes may specify how many days are required for public notice before a zoning change, mandate which documents must be made public or require an environmental review process before a project is approved. Many states also allow local governments to establish special local authorities that can facilitate economic development through incentives to businesses.

Between the constitutions and the state laws, local governments, property owners and communities have had a lot to sue each other over. The result is a large body of case law that controls what cities can and cannot do. These sometimes become ensconced in state or local revisions to land use law but, in many cases, you will not find the decisions in the code books. For example, in California, many of the requirements for the State's environmental review process have been determined through lawsuits, not by legislators.

That said, local governments have a surprising amount of discretion in land use decisions, as long as they can make a reasonable argument that it protects the health and welfare of its residents. For example, a city can require all new buildings in downtown area to have the same facades or require commercial projects to pay fees for affordable housing or child care. Also, some states confer even more autonomy to local governments with a special status called "charter city," "home rule," etc.. So, a state may require a certain process for zoning approvals in most cities, but then exempt home rule cities from that process.

Three Types of Approvals Processes

Large-scale development projects typically must undergo at least one type of approvals process, but, can be required go through two or three types. These types of processes are:

² Other examples are restaurant hygiene, fire safety and city-wide minimum wages.

1. *Land Use Decisions:*

This first process is what we typically think of as planning and land use regulation, such as zoning, subdivisions, permitting, and design review. In most places, all projects, big or small, must meet minimum conditions established by local and state laws. These approvals also typically require a prescribed process that must be followed for each project proposal.

2. *Negotiated Agreements:*

A second decision-making process involves direct government participation in projects, such as providing subsidies, selling land or making agreements for community benefits. Because local governments only choose to actively participate in some projects, these actions are usually discretionary and involve some negotiation. For example, the amount of a subsidy, the sale price of land or the kinds of community benefits all need to be mutually agreed upon.

3. *Environmental Review*

Some states, such as California, Washington and New York, require most large-scale projects to undergo a study of the environmental impacts that a project will create on a community and region. Where there is not state-required review, such as in Illinois and Colorado, other state or local agencies may have some review process triggered by specific kinds of uses, such as factories, reuse of brownfields or a high level of predicted traffic congestion.

Local governments will typically integrate these three types of processes as a way to streamline overall approvals. For example, In Washington, the State requires that the environmental review process be integrated with local governments' approval processes. As a result of this integration, it can seem to both the public and even city officials that they are the same process.

However, it's helpful to understand the distinctions. Because of due process concerns, land use and planning regulations typically have more stringent timelines and public participation requirements. Negotiated agreements, called public-private partnership when the use of government powers or resources are involved, is typically discretionary and hence has fewer rules regarding when and how the decision is made. In California, where public participation requirements are generally high, a city can make an agreement with a developer for a subsidy with only three days notice to the public. Finally, environmental review processes are often established by a different set of controlling laws (usually at the state level) than land use approvals. They typically have very specific minimum standards and public participation requirements that can be very important in influencing project outcomes.

Three Types of Legal Decisions

Local governments typically make three types of approvals for development. The distinction is important, because the kind of decision determines who makes the final call. They are:

1. *Legislative:*

These are decisions that are made by an elected body, like a city council or board of supervisors, that establish the basic set of rules for approving development. Changes to zoning codes or master plans, subdivision of property and providing subsidies are usually legislative decisions. Local governments typically have a high degree of discretion in making legislative decisions.

2. *Quasi-Judicial*

These are decisions delegated to another body, such as a planning commission or zoning board. These bodies don't make the rules, but interpret them on a case by case basis. They typically have some discretion - for example, a plan commission can put conditions on project approval, such as setting back the front of a building. Although governments vary, a quasi-judicial decision can usually be appealed to the legislative body.

3. *Ministerial*

These are decisions which have no discretion. Either a project meets objective criteria or it does not. These are typically made by staff or appointed bodies. The rules that establish ministerial approvals can confer rights to applicants, such the right to a decision in a limited time period or the right to a building permit if an application has been properly filled out.

When you are planning a CBA campaign, knowing the kind of decision at each stage of the approvals process will help you plan who to influence, when to influence and whether a decision can be appealed. For example, even if a planning commission approves a project proposal, you know that the buck ultimately stops at the Council. On the other hand, you may learn that a key decision, such as issuance of a building permit, is ministerial in nature and that trying to lobby the building department director to hold it up is fruitless.

We should not that cities also create a multitude of advisory bodies which can have significant influence in the approvals process. For example, the Chicago Planning Commission does not have legal authority to make any approvals, but their recommendations are rarely ignored by the Council or the Mayor (the Mayor appoints all members of the Commission). Other advisory bodies include neighborhood councils, design review boards, economic development commissions, etc.. While the buck does not stop with these bodies, they can be a critical first stage of intervention for a CBA campaign.

FILLING IN THE DETAILS

With the big picture in mind, you can now start filling in the details. Again, we emphasize that you don't need to learn everything at once. The key is that as you learn the approvals processes in the midst of a campaign, you ask questions that get at who really has decision-making power, where their legal authority to make those decisions come from and what minimum standards must be met.

Who Can Help you Fill in the Framework with Details?

Where do you go to learn about the development process? Most of your questions can be answered by your local government staff and others regularly involved in the development process. If you are in the middle of a CBA campaign, you can start with the planning or economic development staff involved in a project. Keep in mind that local government staff may only know part of the picture and that you always try to get perspectives from other sources. For example, a city staff person may say that a project has to comply with the city's master plan because that's the standard practice. However, the law establishing the master plan may have exceptions that the city staff person is unaware of but developers may know about.

In addition to city staff, other people with expertise include land-use lawyers, environmental protection advocates, journalists, and professors of urban planning. In many cases, these people are willing to share their expertise with community-based organizations where they would otherwise ask for fees from businesses.

Some states provide citizens with guides on local land-use regulations that are controlled by the state. Many law firms who specialize in land-use publish guides or papers that explain development laws to their clients and have an interest in being seen as local experts. Friendly developers can also provide you with both a birds eye view and from in the trenches.

Questions for Understanding Land Use Decisions

The rest of this guide offers a basic set of questions that you can ask to begin filling in the big picture with the details of your local government's approvals process. The questions and the categories under which they fall cannot anticipate every variation of project approval processes. However, they will start you off with an informed set of questions with which you can start using immediately with local experts.

Compliance with Zoning

Zoning codes establish the basic set of rules for land use (what can be built where) and the standards to which development must conform, such as height, density, parking requirements, etc.. This typically results in a map that divides up a city into little areas (like a coloring book) in which residential, commercial and industrial uses are specified.

- Does your local jurisdiction have its own zoning codes? If not, what level of government establishes zoning?
- What does the zoning code consist of? Most cities publish a map of the zones and a set of written rules for each type of zone.
- Are there special zoning areas that are imposed on top of a basic set of codes? These are sometimes called "overlay districts" or "special zoning districts." Examples of this can be central business districts, waterfront districts and natural hazard areas.
- Can exceptions be made for a project? Typical exceptions include:
 - *Conditional use*: zoning codes are often flexible for certain uses if specific conditions are met – for example, while a hotel may not usually be built in a zone intended for retail, a conditional use may be allowed if the developer builds retail on the bottom floor and keeps the building to five or fewer floors. These exceptions are typically

- called Conditional Use Permits (CUP) and can be a powerful tool for local governments to retain control over certain uses.
- *Variance*: zoning codes also allow decision makers to grant a property owner the right to ignore some zoning requirements if he or she is put at a disadvantage because of some feature of the property.
 - *Zoning change*: in most cases, a local government can just change the zoning code to accommodate a specific project proposal that does not meet existing use requirements.
 - *Planned Development Zones*: these are special area where the existing zone designations are lifted and a new set of regulations are negotiated with the developer. They are typically employed for large-scale projects built in several phases over many years.

Compliance with a "Plan"

Many states require or at least authorize local governments to develop big picture plans for the future development of their jurisdiction. These plans, usually called "master plans," "general plans" or "comprehensive plans," can provide both a vision and a constraint for what a community will look like down the road.

- Does the jurisdiction in which you are planning a CBA have a master plan against which projects must be evaluated?
- Does the State or a higher authority require the local government to create one?
- Which body has to create or approve a plan?
- Does the plan mandate compliance or is it just advisory? Many plans are paper tigers.
- Do other sets of rules and regulations have to match the plan, like zoning and subdivision laws? In California, for example, the zoning code must implement a city's general plan.

- Can changes be made to the plan on a project by project basis? Who can make that decision? Are there limitations to changes?
- Are there exemptions incorporated into the plan, such as for affordable housing projects or public facilities?
- Does the plan have to be updated on a regular basis? Has it been properly updated?
- What are the components of the plan? For example, most plans include land-use and transportation components, but some also include noise and safety.
- Does the broader plan for the jurisdiction have special plans for smaller areas? Do they carry the same weight as the larger plan?
- Are there also plans for the broader region in which your jurisdiction lies, like a county, coastal area or floodplain. If so, what agency administers these plans (see “other agency authorities” below for examples)?

Compliance with Subdivision Laws

Subdivision laws govern how property owners can split their parcels into smaller pieces.

However, most projects do not require the subdivision of parcels (in fact, most in-fill projects require assembling smaller parcels into bigger ones). Subdivision is most frequently required to build new suburban housing tracts or create condos and townhomes on urban in-fill property.

- Does the local government have its own set of rules about how land is subdivided into smaller properties?
- If not, what level of government creates those rules and how are they applied?
- Do the subdivision rules allow for exceptions?
- Do property owners have rights to subdivide that are not up to the controlling authority, as long as they meet certain conditions?
- Can local governments impose conditions on properties that are subdivided?

Compliance with Design Guidelines

Design guidelines can be a separate set of rules from zoning codes and master plans that ensure a community or area of a community meet aesthetic standards. These can include the shape of a project, the colors of a building, construction materials and how well it blends in with existing buildings.

- Does your jurisdiction have a set of rules for the design of new projects that are separate from the zoning codes and the master plan?
- Are those rules binding or advisory?
- Who makes the decision about compliance?
- Do all projects have to comply, or just some (such as only large-scale projects or projects in special areas, like downtown or historic districts).

Other Agency Authority

Many jurisdictions have independent or quasi-independent agencies that have some controlling authority over land use. These can be either internal to the local government, such as a council appointed commission, or external, such as state-sponsored agencies, joint government authorities or regional agencies.

Examples of other jurisdictions include

- Redevelopment authorities
- Regional air or water quality agencies
- State Universities
- Regional or state transportation agencies
- Floodplain authorities
- Ports or harbors
- Sports facility authorities

Questions to ask are:

- Are there other agencies that have a controlling authority over land use in your jurisdiction or in parts of it?
- Are these agencies a part of your representative local government or are they an entity created by the state or joint authority of governments?
- How are the agencies governed and how are decision-makers put in place?
- Is the authority limited to specific areas, like coastal areas, floodplains or central business districts? Is the authority based on developing property for specific uses, such as sports coliseums, ports or public transit facilities?
- What kinds of power do they have? Can these agencies stop a project? Can they require changes to a project? Do they have decision-making power that trumps local government authority?
- Is there a public involvement process? Are they subject to freedom of information requests?

Questions for Understanding Negotiated Agreements

This section suggests questions about approvals your local government may make when directly participating in a private development. Participation can include use of government powers or use of resources on behalf of a developer. This kind of participation is usually arrived at through negotiations and through some agreement mechanism. In California, for example, subsidies are typically arranged through a special land-use tool called a Development Agreement. Other examples of agreements are unique ordinances, memorandums of understanding and conditions of approval.

Land sales

Local governments frequently buy and sell land as a way to facilitate private development. There are generally two types of strategies to accomplish this goal. First local governments purchase and hold a piece of property until a developer approaches them with a plan to build something. Second, local governments will assemble many parcel of land into a larger property in order to generate interest in and, to some degree, control development of a particular area. For example, in Oakland, the City had purchased 20 acres of land over the course of two decades in downtown to make sure that whatever project was built would have high density and act as a catalyst for further development. The City recently signed a deal to sell the land to developer to build housing.

We should note that most local governments will negotiate land prices in closed sessions – these deliberations are usually not made public till after the deal is done and some information provided by the developer may never be made public.

- Does your local government typically sell publicly owned land to private developers?
- Does your local government or other agency in the jurisdiction hold land for this specific purpose? (For example, is there a redevelopment authority with the power to buy and sell land?) If so, can you get a list of the larger parcels that it currently owns (these may be the next targets for large-scale development)?
- How are prices for these land sales typically determined? Does the local government conduct independent appraisals? Is the price strictly up to negotiation?
- Are land sale decisions made in a public meeting? Are land sale deliberations ever made public? What information about land sale deliberations can be obtained?
- Does your local government play a role of master developer, where private developers are invited to compete to develop a city-owned property? What are the steps in this process? (For example, in Oakland, California, the City will issue a request for proposals (RFP), award one developer the chance to design a proposal through an exclusive negotiating agreement (ENA) and then accept or reject the proposal after a specified time period.)

Another important tool for local governments to acquire and sell land is the use of “eminent domain.” Eminent domain is the power of government to take private land for public purposes. Typically, the power is reserved for roads, bridges, schools and other facilities that benefit the general public. However, some states allow local governments to take land from one private owner and provide it to another as a way to help revitalize disinvested areas. In this case, the taking of land may not result from a negotiation process, but a legal proceeding. The resale of the land to a developer, however, will involve a negotiated agreement

- Does your local government have eminent domain powers for economic development purposes?
- Can those powers be used only in specific areas? (For example, in many cities, the power is limited to economically distressed areas and are often combined with TIF as way to generate revenues. In California, these areas are called “redevelopment areas.”)
- Where does the authority to use those powers originate? Can decisions be appealed to a higher authority?
- Are there limitations to those powers?

Direct Subsidies

Many local governments actively recruit developers to build in their communities, both commercial and housing, to their jurisdiction through financial incentives. Some of the mechanisms to provide incentives require a public decision-making process.³

- *Grants and loans:*
 - Does your local government offer loans or grants to developers?
 - Are there any criteria for choosing who gets financial assistance?
 - Are there specific programs under which they are offered?

³ An examples of where decision-making is not required for a subsidy is a tax abatement programs that is automatic (ministerial) as long as a business meets minimum requirements.

- Is the origin of the funding local, state or federal? If not local, are there separate standards or rules that have to be applied to a project? For example, if a developer receives Federal Housing and Urban Development loans, the developer typically must create a minimum of one job for every \$35,000 provided.
- Is there a public process, such as a hearing or a time period for the public to view an application?
- *Tax incentives:*
 - Does your local government offer tax abatements, credits or rebates (that is, the property owner ends up paying less in taxes than he or she should)?
 - Is the decision automatic based on meeting criteria (ministerial) or does it require a vote of an elected body (legislative)?
 - Are there criteria for providing tax incentives?
 - Is there a public process, such as a hearing or a time period for the public to view an application?

Indirect Subsidies

Local governments have many tools to assist private development that do not involve a direct transfer of public money. These subsidies can involve government spending money on behalf of a developer or can involve uses of government power that are hard to put a value to.

- *Infrastructure Improvements*

Local governments often assist private developers by paying for infrastructure improvements that help a specific development. Examples include roads, sidewalks, signals, parking garages, etc

- Does your local government ever pay for public improvements that help private developers? Is it on an ad hoc basis, or are there specific programs. For example, a city may rebuild a major intersection to help a new shopping center on a one-time

- basis or it may have a special on-going infrastructure fund for economic development.
- Are there criteria for providing these improvements?
 - Is there a separate process required to approve infrastructure improvements, such as the capital budget?
 - What form do these agreements take or what mechanism is used to guaranteed to improvements?
- *Contribution of staff resources*

Sometimes local governments will help a developer by providing extensive staff services to plan a project. While many cities charge permitting and planning fees, local governments can provide considerable resources for large-scale projects that go beyond standard fees. Another example of this is planning and preparation for a master project in which many developers will individually build, but not pay for the city's overall effort.

Tax Increment Financing (TIF)

Tax increment financing is a special mechanism to raise revenues for development in designated areas that are burdened by economic distress. Typically, taxes paid by property owners in these areas are diverted from general use to be plowed back into the area for economic improvement. Most states in the U.S. have some form of a TIF district policy for local governments.

We mention this financing mechanism for local governments separately because the money generated can be used for both direct and indirect subsidies. Many TIF generating authorities use the money to buy land, make infrastructure improvements, bestow direct subsidies, or make loans. Another standard practice is the issuance of bonds now to be paid off by future tax increments.

- Does your local government allow TIF to be used to assist property owners?
- Can TIF only be used on the property of a specific developer or does the local government collect the tax increment in larger districts?
- What are the boundaries of your TIF areas?
- How are they set up? Who has the power to create them?
- Who controls the use of the tax increment?
- How long do they last?
- Is TIF enabled by the state? If so, are there any minimum standards or criteria for providing assistance to developers?
- Are TIF funds limited in how they can be used? Can they be used for direct subsidies? For example, in California, TIF monies can only be used capital improvements, not for on-going operations.
- Are there any public involvement requirements or public disclosure requirements? For example, in California, if a Redevelopment Agency set-up to administer TIF sells land, a report is required that shows all the public investment made in that parcel before it is sold.
- What is the mechanism by which tax increment is guaranteed to a developer?
- If bonds are usually issued for projects, are there any specific public involvement requirements?

Questions for Understanding Environmental Review

Many states require some environmental review of development projects. In some states, environmental review is mandatory, such as California (CEQA), Washington (SEPA) and New York (CEQR) – but this is not the case in all states. An environmental review process can be critical for ensuring that projects do not have negative environmental impacts on a community or region. But it can also be important for the following:

- Making project impacts on a community more explicit and transparent.

- Provide an important public participation process that can raise the visibility of a project and debate over that project.
- Give citizens a higher authority to appeal to, such as a judge, if the review is done improperly.

We should also note that local governments can have independent environmental review requirements. These requirements may apply generally to all projects or only be triggered by certain uses or scale thresholds. For example, if a developer seeks brownfield clean-up funds or a certification of remediation, he or she may have to conduct some public review of the environmental impacts of the development. Or, in the absence of any review, cities may require that large-scale developments prove that they meet some environmental standards, such as water run-off not polluting local water sources or public waterfront views not being obstructed by large buildings.

- Does your state require environmental review?
- If there is no state required process, does your local government have its own general environmental review process?
- If there is not general review process, are there specific components of the approvals process that require environmental study or permits?
- If there is a required review process, is it mandatory or voluntary? In other words, can a local government approve a project without environmental review?
- Is there a special process established for review? Is the review process linked to the land use approvals process?
- What are the public involvement requirements?
- Do citizens have legal recourse to ensure proper review?

Picturing the Decision Making Structure

At the same time that you are answering the above questions about the project approvals processes, you should also be asking about the overall decision making structure. Who calls the shots? Where is public input required or invited? How does it all fit together? What are the minimum time frames for decisions?

One way to put the details together in a big picture is to create a flowchart of decision-making. If your process is complicated and has many permutations, you can start with a simple decision-making tree. Or, if you are focusing on a specific project, you can chart out the decision gates and timeline. This should include actions by advisory bodies and any required public involvement.

For each type of decision, try to answer the following:

- What are the approval stages?
- Which official bodies must approve or review a project before it advances to the next stage? Typical approval bodies include:
 - Local government elected officials (councilmembers, supervisors, aldermen, etc.)
 - Committees of those elected officials
 - Planning commissions
 - Zoning boards
- Which body has final approval? (If a decision can be appealed to a higher level of government, the lower one does not have final approval powers.)
- Are there maximum or minimum times between actions?
- What powers and discretion do local government staff have in influencing approvals? Are there internal stages of approval, such as certification that applications are complete, that are not public?

OPEN MEETINGS AND FREEDOM OF INFORMATION

Most states have explicit requirements for the openness of meeting between public officials and making government documents available to the public. Some local governments have their own laws as well. It is key to understand these requirements. For example, a local government may make a 200 page agreement with a developer and only be required to release it to the public three days before final approval. You have to be prepared, then, to do a quick analysis of the deal in case the documents are held until the minimum time required.

- Do your state or local laws require that development decisions be made in public meetings?
- Are their notification requirements for meetings? This includes the number of days in advance that the meeting be announced and how it is announced (e.g., the newspaper, a website, etc.).
- Are documents made available to elected officials required to be made available to the public?
- Are there any documents that must be made publicly available for a particular process? For example, in California, any land sale by a redevelopment agency triggers a special public report on the net cost of the land to the agency.
- Does your local government typically prepare internal studies and reports that are not shared?
- Can the public request these studies, as well as internal government memos and communications with developers?
- Is the local government required to notify the public once a developer has applied for approvals or government action on his or her behalf? For example, many local governments send out notifications to neighbors within a certain distance if a property owner has requested a zoning variance.