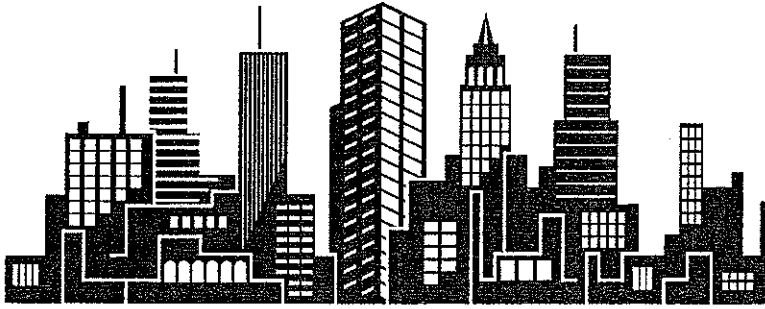


# REAL PROPERTY SECTION REVIEW



*Los  
Angeles  
County  
Bar  
Association*



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# How to Kill a Development Project in 10 Easy Steps

BY ROBERT I. McMURRY AND DWIGHT H. MERRIAM<sup>1</sup>

## Editor's Introduction:

*Respected developer's counsel, land use lawyers Robert I. McMurry and Dwight H. Merriam, recently found themselves confronted with a strange set of circumstances. A member of one of the "royal families" of the environmental movement with more than a century of well-known history of funding growth opposition,<sup>2</sup> but who shall remain nameless because people might boycott his/her bank, approached the duo to draft a Guide to Killing Development Projects, apparently on the same theory that led 7-Eleven to hire successful hold-up artists to design their security system or banks (maybe theirs) to pay Willie Sutton to review vault procedures. Both attorneys, to their credit, firmly declined such an unethical assignment, which led to a doubling of the offered fee, after which the pair began work enthusiastically.*

*The Real Property Review, through its network of moles and spies, has obtained a copy of the draft manual. While written with tongue firmly in cheek, the analysis artfully distills the authors' combined half-century of experience of anti-growth Best Management Practices from the viewpoint of the victims of these tactics. Opponents of development who use such offensive strategies and developers they target, who may find themselves on the defensive as a result, can both learn a great deal of practical value while enjoying a light-hearted break from the ponderous business of real property law. Accordingly, we excerpt the Ten Best (or worst, depending on your perspective) Ways to Kill a Development Project.*

## I. WE DON'T JUST BAMBOOZLE THEM, WE GOOGLE™ THEM:

*Know Thy Enemy:* It's not enough to try to confuse developers about what neighborhood groups want. Never rely on a shell game strategy alone. While some opponents appear to succeed by constantly changing the game on developers, asking weekly for a different type of project, the most effective opponents have learned to know the developer is the enemy and to know him (or her) well. In the computer age we live in, every project opponent has access to the

Internet. The most sophisticated weaponry in an opponent's arsenal is knowledge, and how do we get it—we Google™ them, we Lexis™ them and we Nexis™ them! We find out about every project that the developer has ever completed; we find out what towns they've been to; we find every dissatisfied homeowner who bought from them; we pull up their whole criminal development record. One of the authors appeared at a hearing to seek approval of a land-fill, only to have the sophisticated opposition put up slides with all 261 violations the company had received at its other sites; he left under sheriff's escort. We learn about everything they've done—and, we use it against them.

*All or Nothing is Better than Something:* If in their last project they built a public park, we ask for it and then reject it. If they created a big box, we oppose it eschewing the taunts the developer makes about enhanced tax revenues. Use the "ratchet effect"—anything they have previously given away we know about and that becomes the *starting* point for negotiations. We take the position that we want 200% of the landscaping they provided in their last project. We dispose of their ridiculous color schemes, we

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demand public art. In sum, if a developer previously gave an inch, we make them give a mile.

### 2. "CAN'T WE ALL JUST GET ALONG?" (THE VALUE OF DOUBLE AGENTS):

*Be Friends with Developers.* And, if they should fire one of their consultants, be that person's best friend, (better yet, be at their front door!). The developer and anybody who has previously worked for them are your best source of counter intelligence. The more you know, the more you can rip the project down before it is built. The authors had one case in which the in-house counsel turned in his own boss by revealing bank account numbers so money owed would be collected, another in which a key staff member who had had a "religious conversion" provided full notes of a confidential meeting.

*Support Alternatives.* Alternatives are usually a part of any environmental analysis you have to go through and the trick is that environmental groups usually come up with far fetched alternatives like, "let's turn it into a national park" except that of course nobody has got the money to buy it. What you need to do is come up with some alternative that looks sensible, fair, and reasonable, but just can't possibly be built in an economic fashion and then argue for it. Reasonable but not feasible. Try to come up with something and you'll look like heroes and the other guys will go down. Argue residential for commercial, commercial for industrial, and industrial for residential. Reasonable [just not feasible] is your motto.

*Negotiate to Kill Momentum.* (1) Take time; time is the greatest enemy of a developer; (remember the 3 D's—Delay, Delay Delay!); (2) Get intelligence about the project; (3) Make yourself look like a reasonable person seeking a middle ground, not the radical Nogrowthner you actually are. Never let anyone know you are really a crazy B.A.N.A.N.A.<sup>3</sup>

### 3. DIRTY TRICKS EVEN RICHARD NIXON NEVER THOUGHT OF:

*Seek Funding from Opponents:* Be they other developers, other neighborhood groups, or even tenant competitors of the project. No one hates a big box like another big box. In one California case a business competitor openly admitted he helped oppose a project for purely business reasons — and the court said it did not matter. Thy enemy's enemy is thy friend — at least until *they* try to build something.

*Form a Non-Profit Corporation:* As a corporate entity you can sue a developer or the local municipal government. Your claims can be meritless. With the right judge you may win and receive your attorney's fees (you worked 18 hours a day on the case, remember). Of course, you might lose and your organization might have to pay the developer's attorney's fees, but then again as a non-profit whose only asset is a postage meter, you won't have the money to pay those fees—oh well!

*Get Celebrities To Join Your Cause.* No planning commission can resist the persuasive sway of a Hollywood star. No City Council person is unmoved by a call from someone who has had at least 15 minutes of fame. These are people you want on your side because politicians all think of themselves as friends of celebrities, and friends don't let friends approve bad projects.

*Lobby To Change The Rules/Seek Moratoria.* If you can persuade a state senator or even a county supervisor to enact a new rule it may kill the project. Even better is persuading the local government that it should adopt a moratorium while it studies even the possibility of enacting a new regulation. Remember, time is the soft underbelly of developers. Development and carrying costs on loans for a major project can run into tens of thousands of dollars *per day*. Most states allow moratoria for virtually any reason even for municipalities who think "moratoria" is a typo. A tie-up for a year or two can mean the death penalty for the developer no matter what.

*Buy the property.* Oh, right you say! Well, we've done it, not with bake sales, but with park bonds, conservation funds, corporate donors and incredibly wealthy people who can afford it who put up cash to conserve. Indeed, Ms. Streisand once walked away from a \$15 million Malibu, California estate giving it to a conservation group as a donation to use as a headquarters. She even left her clothes in the closets, although, unfortunately, they did not fit the somewhat larger park rangers.<sup>4</sup>

### 4. \$BLING, BLING, CHA-CHINGS: (MAKE THE PRICE TOO HIGH!):

*Public Demonstrations:* While the 60's may have come and gone and the 70's some say never were, a good old civic resistance can bring such controversy or shame to a public hearing that a planning commission or city council is all but forced to postpone or deny the project. Bring your kids and write speeches for them. Be extreme — we've had people literally chain themselves to hearing room doors; a hunger strike against bad development is something a developer can't buy his way out of and weight-loss strategies are always of great interest to almost everyone.

*Boycotts:* CEO's hate having their bottom line attacked. Once you find out what company will anchor the project—Boycott them! If enough people don't buy, companies become fearful and will often pull out of a project. No anchor means no financing and no money means no project. Another tactic is to boycott the bank funding the project. Getting six-year-olds to close their Christmas savings accounts makes great press. Don't laugh — hundreds of California kids did it to Washington Mutual, and the bank's Ahmanson Ranch Project is now a public park.

### 5. S.N.A.F.U. (MESSED UP NOTICING AND OTHER HANDY HINTS):

*Got Notice?:* There's always somebody they forgot. In one case, involving a condemnation for major development purposes, the (unwilling) property owner wasn't notified and the entire project was stalled as a result. The second time around — you guessed it, the chagrined public entity noticed virtually everyone in Los Angeles, except one person, the owner of the property. Project overturned again. No one messes up a noticing process better than local government. Remember, these are the same people who used to run the post office. In another case (*Concerned citizens of Great Falls v. Constellation-Potomac, 716 A.2d.353*) (1997) a developer made repeated reductions to the size of the project to appease the opposition right up to the last four days before the final hearing. The grateful opponents successfully sued to overturn the project's approvals for failure to comply with a ten-day notice requirement.

*Tricks of the Hearing Trade:* 1) Pack the record with thousands of pages—make sure and do it on the last night of the hearing; 2) Pack the hearing room—if the auditorium holds 600 people make sure 1,200 show up (if they let everyone in, call the fire marshal); 3) Demand special accommodations—the disabled members of your opposition group are entitled to equal treatment under the law. Ask for hearing aids, enlarged versions and "special versions" of the information presented. (Let them figure out what a special version is and make them translate it into Spanish and Vietnamese).

### 6. TAINT AND PAINT:

*Claim Native American Rights Exist:* Don't try to apply logic here, just do a rain dance. Remember, thousands of years ago your city didn't look this way and your aim should be to return it to its pre-development condition. If at all possible get folks who have true Native American heritage to come to the hearing—preferably not wearing three-piece suits (tradi-

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tional garb preferred). One project we opposed on Los Angeles' second busiest commercial street foundered when it turned out to be a 7,000 year old Indian burial ground and a current chief took to praying at the site on a regular basis. In another case, a proposal to convert a Staten Island Ferry to a waterfront restaurant drew a local Native American in full-feather dress, who testified that his family used to canoe on that part of the river.

*My Great Great Grandfather Sunbathed On This Beach:* Public Trust claims are a wonderful way of muddying up the development waters. Anytime beachfront or park side property is involved it's best to claim that the property proposed for development is in part controlled or owned by the Public Trust. Painting a picture that the proposed development involves tainted title is a sure fire means of angering area residents and scaring politicians away from an approval. No jurisdiction wants to be sued for giving away public land to a developer.

### 7. YOU GOTTA GET POLITICAL, POLITICAL, LET'S GET POLITICAL.:

*Prepare Surveys:* So your last name isn't Gallup—so what! Cleverly written questions such as "do you favor this monstrosity?" will lead you to obtain very favorable percentage points amongst your hand selected survey participants squarely opposing a project. As an experiment, one academic proposed petitions both for and against a project, with difficult "slanted" wording. A majority of people emerging from the local Safeway happily signed both.

*Get 'em Where They Shop:* The developer may have more pesos, but you've got more personas—turn them out. There is nothing like a long council meeting, well attended by community members sighting a parade of horrors, to effect a project denial. Moreover, this is a great time to turn in the hundreds, if not thousands, of signatures your team gathered at the local Wal-Mart to the City Clerk.

*Hold Meetings and Invite Officials:* Everyone knows that most politicians will attend the opening of an envelope if you invite them. Community meetings attended by those that will eventually vote on the project are a great opportunity to tell politicians why the project is bad Bad BAD! (read: deny, Deny, DENY).

*Contribute \$ to Campaigns:* Every dollar a candidate receives counts. Ten voters each contributing \$25 to a candidate sends a powerful message to the elected officials. Remember: "Money talks, and politicians fear the ballot box."

*Surround and Conquer:* You and your pals have lived in the community for years. Amongst your group there are memberships in churches, Rotary, veterans groups, the PTA and the Masons. Every meeting of these groups is an opportunity to build opposition. Excepting Christmas and Easter, or high holidays, it's always OK to bring petitions to church/synagogue. (Of course most people only go to services on Christmas and Easter or high holidays.) While the developer may belong to the country club, your friends at the lodge are more numerous and they'll sign your petition (as long as you do the funny handshake first).

*It Pays to Advertise:* Anyone with a laser printer and a mouse can click and print. Plaster the town red (or any other distinctive color). Put signs everywhere opposing the project—no one can stop you—it's free speech. Car wash bulletin boards, telephone poles, boarded-up buildings, even parked city vehicles are fair game.

### 8. THESE ARE THE THINGS FOOLS ARE MADE OF:

*Before the Hearing:*

*Check the Public File Weekly, If Not Daily:* The project file will continue to grow throughout the entitlement process. Knowing who's on first, what's on second and a list of "I don't like this project" letter writers adds to your group's power. Quit speaking to any of your friends who write letters of support for the project, or in the alternative egg their house ("just kidding"—our liability carriers say we have to say that).

*At the Hearing:*

*Counter Their Evidence with Affidavits from Knowledgeable People:* If they say the project won't bring more traffic, then ask how it will increase revenues for the County or City coffers. Question their statistics. Check their math, and if their numbers are off by even one decimal point, tell the whole town at the microphone. Developers who can't add shouldn't build. (In one case the author was confronted by a homeowner who objected to the proposed noise levels, which he had cited as equivalent to a chain saw—which he promptly pulled out of his bag and fired up. He was hauled away, but later, so were four of the five council members who had taken money from the developer). Every town has a retired engineer, and in a lot of cases there is a good reason why they are retired. Use them anyway. On the other side, a fairly well-known biology expert was tripped up when the enterprising teenage son of an opponent discovered the biologist's degree from "Georgia University" was a mail-in from the back of a comic book. In the eight years no one had ever called the Georgia University to check

up on him. We know one expert from an "Institute." It turns out he was the only one from the "Institute," the offices of which were in the basement of his home.

*Script All Testimony:* The legions of folks you bring to the hearing need not all speak. But, get every Jeopardy contestant, drama club president and beauty queen in the jurisdiction in front of the microphone. Have the first speaker start with "Friends, Councilmembers, and Countrymen..." "ten well-scripted and rehearsed opponents can leave even the best developer unable to recover in their rebuttal testimony, particularly if the speakers are known or respected community members.

*Pretty as a Picture:* The developer will bring every color printed, scenic diagram he possesses to the hearing to illustrate how beautiful his project is. Nothing will be more damaging to the developer than pictures taken from a disposable camera of his earlier (less beautiful) projects. Note: if you are a naturally talented photographer, just photocopy your photos—a photocopy of a photograph just isn't a pretty picture.

*Bad Karma—What They Did Elsewhere:* In addition to ugly photos, most any project created almost anywhere suffered controversy of some kind. News articles, testimony from other town no-growthers or letters from politicians in those towns who voted in the minority to disapprove the developer's other projects are poisonous to the sterling image the developer has created in your town. Municipal Codes are so intricate nowadays that every builder violates something—and that's a crime.

*Show Solidarity:* Make and wear pins, hats and t-shirts with logos. When decision-makers see a group of similarly clad nimbys at a hearing, they can't help but want to echo the moniker on your button or t-shirt—NO! Or use their logo, with the international circle and slash symbol over it.

### 9. IT AIN'T OVER UNTIL IT'S OVER (PERFECTING THE APPEAL):

*Ensure Your Standing (They May Not Be Able to If You Do Everything We Recommend):* To file, California courts require that a petitioner have made an argument in writing or on the record opposing the project on specific grounds. We recommend that the intended petitioner submit the 400,000 pages (see number five above) and reference them when speaking at the microphone. Remember, an opponent must exhaust his or her administrative remedies, not to mention exhaust the developer.

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**Funding the Appeal:** Some attorneys will co-challenge the developer's approval on contingency because the developer ultimately pays the attorney's fees if the challenge succeeds. Some will take the case at a reduced rate or for no cost because they believe in your cause. But if your attorney is working on contingency or "for the cause," be patient, he is likely juggling you amongst his traffic accident and fixed-fee divorce cases, or in between other causes he no doubt believes in with equal fervor.

**Use Multiple Plaintiffs with Divided Allegiances:** This approach is much like when you were a kid and you took a needle to the tree house with your best friend. You both pricked your thumb and then stuck them together becoming "blood relatives." By joining the claims of multiple opponents, the case is certain never to settle because even though you're now "related," you're not quite ready to jump off a cliff just for the sake of your blood brothers.

### 10. LET THEM SAVE FACE:

**Alternative Sites:** Be willing to support an alternative location for the project (particularly if it is not in your town).

**Alternative Projects:** Be willing to support an alternative project; remember — "reasonable, just not feasible."

**Tax-Advantaged Sales for Conservation:** Support a solution that gives the developer a tax break by giving some of his land to a conservancy while building a much smaller (read: tiny) project allowing him to leave town with the shirt on his back, if not the Prada shoes on his feet, that were new when he arrived. Be magnanimous in victory, even if you have no idea what magnanimous means.

In summary...

We hear you groaning because you've caused others to suffer by using these tactics, or you've been victimized by them. Half the battle is recognizing them for what they are and using them as a sword — or shield — as the case may be.

One of the best ways to learn what to expect from the other side is join them once in a while.

When the opposition becomes a developer, or the developer works to defeat a project, they learn volumes.

*The editors realize that this article may inspire one or more readers to respond. If you are one of those readers and would like to provide comments, please send them to JEH@MSK.COM. If they are pertinent and insightful, they will be published in an upcoming issue of the Review.*

- <sup>1</sup> With special thanks to Todd Elliott for his witty and unrestrained editing.
- <sup>2</sup> The Statue of Liberty was originally intended to be placed on 83rd Avenue in Central Park, but was relocated to Liberty Island due in large part by the family's generous funding of the permit challenge by the Park Avenue NIMBY Association against New York City.
- <sup>3</sup> Build Absolutely Nothing Anywhere Never Again.
- <sup>4</sup> This one is not wit but fact; one of the authors in a brief fit of conscience represented the conservancy in the transaction.
- <sup>5</sup> (Sung to the beat of Olivia Newton-John's 1981 classic hit "Physical").

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