

Planning Experts at Trial: Attorney-Appraiser Interaction

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Why use a planner? Planners help make it real!

- They are real world (knowledgeable buyer and seller information)
- They have expertise that the appraiser does not have
- Not considered advocates
- The other side might retain one
- They can bring your case some life
- They take away some of the subjectivity

Areas in which planner testimony can be very useful include:

- Highest and Best Use analysis (*physically possible, legally permissible, and financially feasible*)
- Severance damages (*e.g., constraints, cost to cure*)
- Site constraints (*e.g., easements, wetlands*)

What evidence can be presented with a planner?

- Case law generally provides that the definition of “just compensation” cannot be based on the value for a specific purpose but can consider the land’s adaptability for any feasible use. Planner-generated evidence should therefore not be limited to one specific use.

Conceptual plans are most often admissible.

- An owner may not prove damages with evidence that the taking will frustrate a specific plan but “may introduce a map, diagram or illustration of proposed uses of a property to show whether such uses are feasible and whether the property is adaptable to those uses. [Citations omitted.]” *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289,300.
- Three diagrams showing where additional 7,870 square feet could be added not a specific plan of development. The plans “simply presented evidence of the highest and best use of the property...” and were admissible. *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 929.
- Construction plans are admissible when offered merely as an illustration of one of the uses to which the property is adapted (but not to show a specific land use) or to demonstrate “feasibility of the construction.” *People Ex. Rel. Dept. of Transportation v. Tanczos* (1196) 42 Cal.App.4th 1215, 1218-1219.

Economic feasibility studies are sometimes admissible.

- In *People v. Flintkote* (1968) 264 Cal.App.2d 97 a valuation issue was the economic feasibility of underwater mining operations, thus, “[e]vidence as to the economic feasibility of underwater mining [engineer’s testimony regarding the costs] on the subject property was relevant to the issue of valuation” and should have been admitted into evidence. (Brackets added.) *Id.* at 102.
- “[E]vidence of a proposed use may be relevant in some cases, not to enhance damages but merely to show that the plan is feasible” but evidence of “profit, method of operation, costs, etc. of the proposed plan [grocery store]” is not admissible. *Laguna Salada Union Elementary School District v. Pacific Development Company* (1953) 119 Cal.App.2d 470, 476.
- Costs of land development based on specific plans held inadmissible. Evidence “constituted an attempt by defendant to obtain measure of damages based on frustration of a specific plan of development as illustrated by specific costs referred to in the offer of proof...” *People v. Princess Park Estates* (1969) 270 Cal.App.2d 876, 884.

Practical Considerations

- Get the appraiser involved
- Keep it conceptual (more than one plan)
- Show that the issue is disputed
- Consider obtaining cost estimates even if not admissible

Examples

- Architect designed mixed-use around PG&E easement
- Parking lot taking. Architect design garage, contractor estimate cost. Cost to cure.
- Plans showing developable area including steep slope and underground easement.
- Before and after plans showing restricted parking and reduced FAR achievable due to restricted access, size and shape.
- Planner testifies about reasonable probability of zone change.

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When, Why, and How does an appraiser (and the case) benefit from working with a planning expert?

In particular, (1) in cases involving complex Highest and Best Use, when concept designs or diagrams of the property in its before and after conditions enhance the Highest and Best Use analysis; and/or (2) to conceptualize diminution of physical use or adaptability of the property in the after condition (damages).

Planners and Planner/Engineers:

- Have areas of expertise that the typical appraiser does not
- Can investigate and prepare engineering and planning analyses, conceptual designs, site plans, cost runs, etc.
- Can run a parallel and independent path of the appraiser in some of the same areas of analysis that complement and support the appraiser's analyses and conclusions
- May have previously held a senior level position (*e.g., Director of Planning*) in the planning jurisdiction in which the take property is located, adding specialized knowledge about the jurisdiction and credibility
- Can explain and discuss the approval process at the planning jurisdiction from the position of experience

Types of Planning and Engineering Consultants

- Retired public agency planner turned planning consultant
 - San Jose Animal Shelter
 - Donati
 - Fremont BART Extension
- Planner/Engineer Consultant
 - Shamrock Ranch/Devil's Slide

Facts and Overview of the Shamrock Ranch Case

- City of Pacifica Location Slide
- Shamrock Ranch Site Boundaries
- Pacifica City Limits and Sphere of Influence boundaries
- Excerpt from *City of Pacifica General Plan: City's Stated Plan for Shamrock Ranch*

The Shamrock Ranch case at Devil's Slide exemplifies a complex Highest and Best use case and how a planning/engineering consultant contributes to the analysis

- Property value is based on Highest and Best Use, not necessarily on the use at the time of taking, taking into account "the highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value." *People ex rel Public Works Board v. Talleur* (1978) 79 Cal.App.3d 690, 695.
- This sets in motion analyses by the appraiser and planning consultant to:
 - Determine the adaptability of the property at its potential highest and best use and whether size, shape, topographical, and physical and location conditions will accommodate the "higher" use. *Hayward Union High School District v. Lemos* (1960) 187 Cal.App.2d 348.
 - And determine whether the character and the neighborhood and trends in development (existing and proposed) of other properties in the general vicinity would support and allow the "higher" use. *People ex rel Dept. of Public Works v. City of Los Angeles* (1963) 220 Cal.App.2d 345, 352.

Probability of zoning change: *People ex rel Dept. of Public Works v. Arthofer* (1966) 245 Cal.App.2d 454.

- Investigate and familiarize with land use maps (Zoning and General Plan) and ordinances
- Interview planning officials and utility jurisdictions
- Understand the policies of the planning commission and the governing legislative bodies (e.g., *City Council, Board of Supervisors, LAFCO*)
- Review zoning applications and/or General Plan amendments and the action taken for other comparable properties
- Obtain input and opinions of decision makers (e.g., *Director of Planning, City Council members*)

Prepare conceptual development designs and diagrams showing:

- The property's physical adaptability relative to its size, shape, and topographical characteristics, *San Diego Metro. Transit Development Board v. Cushman* (1997) 53 Cal.App.4d 918, and to its access points and available utilities, including constraints of easements or sensitive habitat areas or corridors; and,
- The need for and costs of site development liabilities that would affect fair market value, such as poor soils, geologic conditions, or flooding history. *Coachella Valley Water District v. Western Allied Properties* (1987) 190 Cal.App.3d 969.
- The character and development trends of the neighborhood
 - *Power Point Slides – prepared by Gary Wincott*
 - Conceptual Site Development Plans A, B, and C
 - Discuss and show, if possible, the conceptual designs to staff and decision makers at Planning, Public Works, Planning Commission, City Council, LAFCO, etc. to get input and opinions about the adaptability of the designs and reasonable probability of approval at the municipal levels.

Prepare development costs for the conceptual development designs and diagrams – Feasibility Studies

- To the extent that it is needed and is available (or the property may be atypical of the comparable sales) feasibility considerations including costs are part of the typical highest and best use analysis tests (Financial Feasibility and Maximum Profitability) and answer the possible cross-examination question if this analysis was considered by the appraiser in reaching his or her value.
 - *Power Point Slides – prepared by Gary Wincott*
 - Conceptual Detailed Site Development Cost Plans A, B, and C

Analysis of diminution of physical adaptability and severance damages – use of planning and architectural and engineering studies, conceptual plans and diagrams and cost feasibility studies to analyze diminution in physical adaptability and severance damages analysis. *People ex rel State Park Commission v. Johnson* (1962) 203 Cal.App.2d 712.

- Prepare conceptual plans and diagrams, etc., show or indicate a diminution in reasonable probable physical use of the property in the after condition – land use adaptability changes in topography, size, shape, access to utilities, roads, density distribution over the site, etc.

Summary:

- The Planning/ Engineering Consultant can bring the abstract to life, providing land use concepts in diagrams and studies and showing levels of detail the typical appraiser may not be able, because of possessing different expertise
- These diagrams may, then, be shown to planning and municipal personnel to elicit input and opinions
- Plans, diagrams and studies may be presentable to the jury, subject to challenges; keep them conceptual and prepare more than one study
- The planning consultant adds an additional level of independent evaluation and brings credibility to the process
- Assists the appraiser in his or her Highest and Best Use analysis and on the analysis of the effects of the take and/or project on the remainder property.