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TIPS FOR PRACTICE BEFORE THE
HEARINGS BOARDS – PRIVATE SECTOR

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A. Before the Appeal is Filed.

1. Begin to develop your theme. What is the one sentence that encapsulates your factual, policy, and legal argument? For example: “Ordinance 999 is unlawful because it perpetuates urban sprawl and does not provide for compact urban development.” This theme will accompany you as you present your case to local government, the Board, and the courts. You will hone your theme as your journey progresses. But the essence of the theme will remain the core of your case. So generate it with care.

2. Be certain that the record supports that theme. First, review and analyze all of the reports and analyses prepared by the local government and its consultants. Do the data support the conclusions reached? Have your consultants either reinforce those data and conclusions or rebut them, depending on whether you are seeking to support or to contest the local government action. In some circumstances, it will be necessary for your consultants to prepare their own reports. As you develop the record, keep in mind the two consecutive audiences you need to seek to convince – first, the local governing body, and second, the Board.

3. In your comments at public hearings and in your written submissions to the local government, be as specific as you can be in stating what the local government should be doing and why it should be doing it. This has two advantages. First, it provides support for the local government’s action in case the local government decides to act in favor of your client. Second, in the event the local government acts against your client’s wishes, you will have a record indicating that you gave it a fair chance to act lawfully, but that you were unreasonably rebuffed.

B. Petition for Review.

1. In appropriate cases, make a public records request immediately after the local government takes action and before you file your appeal. In particular, ask for copies of all relevant emails sent to and by Planning Commissioners and Council members, including from their homes. Nine times out of ten, there will be documents produced in response to your request that are not included in the record generated by the City or County Clerk. Almost as frequently, the documents you obtain that were not

included in the record will be documents that are helpful to your case. This is not to suggest that the local government is intentionally withholding documents. Rather, the fact is that many of these cases involve so many documents that it is difficult to impossible for the Clerk to keep track of them all.

2. The petition for review is the first opportunity you have to tell your story. Draft it with care, keep your theme in mind, and tell your story compellingly. Explain at the beginning what the local government did, why it did it, why it was illegal, and why it was against public policy. Avoid being overwrought, but by the same token feel free to utilize appropriate rhetorical flair. You will want to keep your readers awake and interested. You will want them to care.

3. You have the luxury of sixty days to draft your petition. Do not wait until the end. Read the statute carefully and check the case law of the Board. Make certain you have identified every issue you wish to raise and that you have stated the issue clearly. Make certain, also, that every issue is within the jurisdiction of the Board. You do not want the prehearing conference to focus on all of the issues you have raised that will be dismissed *ab initio*. Put thought into organization of issues. Generally, you will want to place the strongest issues first, and the secondary or supporting issues toward the end. Evaluate whether your weaker issues are worth raising at all. You will lose credibility if you identify an issue and then choose not to brief it.

4. The petition is also your first opportunity to create a momentum of inevitability. The statement of facts in the petition, followed by the statement of issues, should leave the readers with the sense that your case is sound and difficult to refute. The petition is the first encounter the Board will have with the case. It will be many weeks until the Board receives your the brief. Make certain that this encounter with your case is memorable, credible, and leaves the Board wanting to know more.

C. Writing the Brief

1. Facts, facts, facts. We tend to think of ourselves as professionals trained in the law. And the law is certainly an important component of your brief before the Board. But far more important is your role as presenter of the facts. It will always be the facts, more than anything else, that result in a win or a loss before the Board. And while the facts are the facts, their skillful presentation will have a substantial role to play in the outcome of your appeal. First, of course, it will be necessary to have developed the record well at the local government level. It is too late now to do so. Second, immerse yourself completely in the record. Know it inside and out, better than the government, better than the planners, better than the lawyers for the government. Third, study carefully all of the backup technical studies. There is always gold to be mined in those studies, gold that will support your case and undermine the government's. Fourth, think about those facts in light of the applicable law. Think about each element that you need to prove, and identify the facts in the record that tend to prove that element. Fifth, after steps one through four have been completed, and only then, prepare your statement of facts. The statement of facts needs to be dramatic (but not melodramatic), sympathetic,

objective, fair, accurate, reliable, cumulative, and more or less overwhelming, so that the readers, even before seeing your legal argument, want to rule in your favor.

2. Let the headings tell the story. It's like watching a movie without the sound. You can still get the full gist of the drama. Similarly, your headings by themselves are story-telling devices. Simply by reading the headings alone, a reader should be able to develop a sense of your factual narrative. Headings also give your reader a visual stopping place to rest between sections of the narrative, to think about what has just been read and to look forward to what is to come. Use headings wisely and thoughtfully.

3. Needless to say, the burden of proof is an important issue to address. After the facts, it may well be the second most significant matter. It is critical to acknowledge your burden, and address it forthrightly. Explain how it is that, given the burden you bear, the law still requires the Board to rule in your favor. Three recent significant cases on this subject are *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488 (2006); *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Washington Supreme Court Docket Number 76339-9 (September 13, 2007); and *Gold Star Resorts v. Futurewise*, Washington Court of Appeals Div. I Docket Number 58379-4 (August 27, 2007).

4. Board cases always raise issues of public policy. Do not limit your research and briefing to the law. Incorporate into your brief appropriate authorities from the planning and scientific professions. The American Planning Association and the Urban Planning Institute are excellent sources of publications on the issues that come up before the Board. Also, the website smartgrowth.org has many good leads on growth management topics. To the extent you can have these documents entered into the administrative record before the appeal is filed, all the better!

5. Read all cases cited by the opposition. Frequently and ironically, they will be the source of strong support for the positions you are asserting in the appeal.

6. I am of the school that opposes footnotes in briefs. If it is worth saying, it is worth having in the text. If it is not worth saying, it should be left out. Footnotes interrupt the flow of the factual and legal narratives, and constitute a visual blight on the page.

7. As with the facts section, use headings as a tool to assist your readers to follow the flow of your legal argument. The headings should state each major step in the legal analysis, and should draw the readers with interest into the substance of your text.

8. Always be courteous, but never forget to go for the jugular. This is blood sport. The local government ordinance is your prey. The facts, the law, and your skills at persuasion are your weapons. Use them efficiently, judiciously, and effectively, to incapacitate the unlawful ordinance that stands before the Board.

D. Hearing on the Merits

1. Ninety percent of the time, an appeal is won or lost on the briefs. In those cases, oral argument is a non-event. However, the correlate to this truism is that ten percent of the time, an appeal is won or lost at oral argument. It is for that reason that we prepare so thoroughly for the argument.

2. Always be courteous to counsel for respondents, and to the Board. Listen carefully to the Board's questions, then pause, then answer. Don't be bashful to concede that you don't know the answer if you don't. You are not expected to know the facts and holdings of every case decided by the three Boards.

3. Always begin, and end, with your theme. It is the melody you want to leave in the decision makers' mind once the argument is complete.

4. The Board members will have read all of the submissions prior to argument. The questions the Board members ask will tend to express their major concerns with your case. As you prepare your argument, think of the major weaknesses in your argument, and plan succinct and convincing responses to the questions you are likely to receive. Be (rationally) paranoid. Think in terms of what you would attack if you were on the other side. Be ready to respond to each such attack. Use the questions asked by the Board as opportunities to answer the substance of the attack and to reassert your strength. Be candid. Acknowledge that you were expecting the question. Be glad to receive the question. Provide your best response.

5. Listen to the questions posed by other counsel. When it's your turn to argue, take the opportunity to answer those questions as well, either at the beginning of your remarks, or at the appropriate point of your outline.

6. I like to use handouts. They give something physical for the Board members to hold and to look at as you argue. They keep the Board's attention on the structure of your presentation. They help you look organized. It provides an additional medium for your message to enter the minds of the Board (written as well as vocal). And it is not uncommon that the Board members will use the handouts to take notes during your argument. When that happens, you can expect that your handout will be on the Board members' desks when it comes time to draft the final decision and order. I have attached as an example a handout I used recently at a hearing on the merits before the Central Board.

E. Conclusion

1. The opportunity that we have as land use counsel to practice before the Board is a special one. There are few states that have special state-wide boards with land use expertise to address land use disputes.

2. I heartily recommend that you make the most of this opportunity by doing the best job you possibly can to prepare the record, the appeal, the brief, and argument. Have fun, be diligent, be courteous, and above all, be appreciative of this very special institution.