The Role of Legislative Findings

Thursday, September 19, 2013; 2:45 – 4:00 p.m.

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The Role of Legislative Findings:
Understanding the Purpose and Function of Legislative Findings

League of California Cities Annual Conference
September 19, 2013

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I. Introduction/Overview

It is common knowledge that a core function of municipalities is to take legislative action. A city acts in a legislative capacity when it is making policy, either adopting ordinances or resolutions, and acts in an adjudicatory, or quasi-judicial, capacity when it applies facts to an established policy and renders a decision, such as in granting a use permit or approving a zoning variance. Regardless of the role that a municipality fulfills, the municipality must nonetheless act in a reasonable manner, or the action will be struck down for exceeding the city's authority. Often times, findings are required by statute, and other times findings supporting the action are simply recommended, such as when a municipality is enacting an ordinance that implicates constitutional rights. Regardless, the manner in which an agency acts will dictate the requirements or guidelines for making appropriate findings. There is extensive law establishing what findings are required when acting in an adjudicatory manner, but little guidance exists regarding the use of findings in the legislative context. This paper focuses on the requirements and recommended practices when adopting legislative actions.

With a dearth of case law regarding legislative findings, the more developed body of law addressing adjudicatory findings is instructive. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506 (“Topanga”) is the seminal adjudicatory findings case. Topanga requires adjudicatory or quasi-judicial actions taken by a municipality to be supported by findings explaining the decision-making body’s analysis. (Topanga, supra, 11 Cal.3d at 515.) In Topanga, the California Supreme Court
held that an agency must set forth findings to “bridge the analytic gap between the raw evidence and the ultimate decision or order.” (Ibid.) Furthermore, the findings set forth by the agency must be supported by substantial evidence in the record. (Id. at 514.)

Unless specifically required by the authorizing statute, legislative actions do not require explicit findings. (Id.; see, e.g., Cormier v. County of San Luis Obispo (1984) 161 Cal.App.3d 850, 852 [unless special circumstances exist, specific findings are not required for a legislative act].) However, Topanga’s rationale for requiring findings – exposing a local decision making body’s analysis and thought process – is equally relevant in the legislative context. Use of legislative findings will give a reviewing court a “roadmap,” will assist the court in its analysis, and hopefully encourage judicial deference to the legislative body’s determination. Also, when findings and the ordinance’s rationale are explicit and present in the ordinance, a court has no need to go on an ‘expedition’ looking for the rationale in extrinsic evidence, such as staff reports, testimony, or historical documents. (Taylor v. Cole (1927) 201 Cal. 327, 337) [“in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice.”].

Further, findings can function to dispose of any improper or illicit motives offered by plaintiffs challenging an ordinance. As the Topanga Court explained:

Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the
decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained. In the process, the court is required to do much that is assigned to the board.

(*Topanga* at 517 n. 15, citing 3 Anderson, American Law of Zoning (1968) § 16.41, p. 242.) The California Supreme Court also noted in *Topanga* that express findings can “serve a public relations function” by demonstrating that the local agency acted thoughtfully and reasonably. (*Topanga* at 517.)

Provided that a municipality acts within its authority and does not enact laws that conflict with state or federal law, a reviewing court should give deference to that municipality’s judgment. (*See United States v. O’Brien* (1968) 391 U.S. 367, 383, quoting *McCray v. United States* (1904) 195 U.S. 27, 56 [that courts will not assume that legislation was enacted with improper purpose or motive]; *Id.* at 383 [“Inquiries into congressional motives or purposes are a hazardous matter.”].)

Courts also follow this deferential approach when reviewing local ordinances adopted by municipalities. This is in part due to court’s deference to the separation of powers doctrine, which directs courts to exercise limited review of legislative actions. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-
Additionally, a reviewing court will not delve into the motivation and reasoning process of legislative bodies, but rather assess a legislative body’s decision on its face. *(Fairfield v. Superior Court of Solano County (1975) 14 Cal.3d 768, 777.)* Crafting well-reasoned, explicit findings may help limit a court’s review to the text of a challenged ordinance.

However, this judicial deference cannot be taken for granted. Legislative action must comply with the applicable authority granted to the municipality. To that end, at a basic level, a municipality must have a rationale for its legislative actions. Legislative findings serve as the explicit rationale for a legislative action. As Tom Cruise’s character, Jerry Maguire, stated in the movie *Jerry Maguire,* “Help me... help you. Help me, help you.” Legislative findings will help a court understand the local municipality’s goals and purposes, and establish a rationale for the regulation, thus giving the court the ability to defer to the local municipality’s judgment.

**II. Structure/Form of Findings**

In general, legislative findings should have some basic qualities. First, findings must be relevant and reasonable. In essence, do they fit with the proposed legislative action? The legislative findings should support the municipality’s rationale in enacting the ordinance. At a minimum, they should demonstrate that the action is not arbitrary, and that it bears a “reasonable relation to the public welfare.” *(Towards Responsibility in Planning v. City Council (1988) 200 Cal.App.3d 671, 678.)*
Findings can take any structure or form so long as they reveal the legislative body’s analytic route from evidence to conclusions. (Hadley v. City of Ontario (1974) 43 Cal.App.3d 121, 128 [“We do not mean to hold that formal findings of fact, such as would be prepared by a court, must be entered. Findings may be formal or informal and may in some cases be contained in the order made.”].) When reviewing administrative decisions, courts will focus on the substance contained in the findings more than the actual form that the findings take. (McMillan v. American General Finance Corp. (1976) 60 Cal.App.3d 175, 183.) Courts have recognized findings adopted by reference as valid. (Ibid.) Although the line of cases discussing the importance of substance over form have been within the context of quasi-judicial determinations, this reasoning easily applies to legislative findings where there are no formal requirements. Thus, when crafting legislative findings, focus on demonstrating that the legislative action is lawful. In order to demonstrate lawful action, findings should be supported by relevant evidence. Findings that are not supported by any evidence are not sufficient to take precedence over a court’s express findings to the contrary. (Professional Engineers v. Department of Transportation (1997) 15 Cal.4th 543, 572, superseded on other grounds.)
III. When Legislative Findings are Statutorily Required

Statutory findings cannot be boilerplate or conclusory. They need to apply specific facts to the action required by the statutory authority. (City of Carmel-By-The-Sea v. Board of Supervisors (1977) 71 Cal.App.3d 84, 92, citing Topanga.) However, if the statutory requirements for findings are precise, a recitation of the statute could be sufficient. For example, in Jacobson v. County of Los Angeles, Los Angeles County granted a conditional use permit and made findings that were almost a verbatim recital of the findings stated in the County ordinance. (69 Cal.App.3d 374.) The court found that the County’s required conditional use permit findings were adequate because they were sufficiently precise and detailed. (Jacobson v. County of Los Angeles (1977) 69 Cal.App.3d 374, 389.)

Courts normally defer to the public agency for statutorily required findings. As long as an ordinance cites a factual basis for its findings and those facts can reasonably be held to establish the proffered rationale, the court will not “second guess” the municipality. The table below identifies some commonly enacted ordinances and other legislative actions that, by statute, require legislative findings.

<table>
<thead>
<tr>
<th>Legislative Action</th>
<th>Finding(s) Required</th>
<th>Statutory Authority</th>
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<tbody>
<tr>
<td>Acquisition or transfer of property</td>
<td>Consistent with General Plan</td>
<td>Gov. Code, § 65402</td>
</tr>
<tr>
<td>CEQA compliance</td>
<td>The Project will not have a significant environmental effect without adoption of feasible mitigation measures; or there are specific overriding considerations</td>
<td>Pub. Resources Code, § 21081</td>
</tr>
<tr>
<td>Development Agreement</td>
<td>Consistent with General Plan and any applicable Specific Plan</td>
<td>Gov. Code, § 65867.5(b)</td>
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<tr>
<td>General Plan and Specific Plan</td>
<td>Consistent with county Airport Land Use Plan</td>
<td>Gov. Code, § 65302.3; Pub. Util. Code, § 21676</td>
</tr>
<tr>
<td>General Plan Adoption or Amendment that limits the number of housing units which may be constructed on an annual basis</td>
<td>Justification for reducing the housing opportunities of the region, which includes: (a) A description of the city’s or county’s appropriate share of the regional need for housing. (b) A description of the specific housing programs and activities being undertaken by the local jurisdiction to fulfill the requirements of subdivision (c) of Section 65302. (c) A description of how the public health, safety, and welfare would be promoted by such adoption or amendment. (d) The fiscal and environmental resources available to the local jurisdiction.</td>
<td>Gov. Code, § 65302.8</td>
</tr>
<tr>
<td>Interim Ordinance/Moratorium</td>
<td>Immediate threat to public health safety or welfare if land use approvals are allowed to occur pending adoption of permanent regulations.</td>
<td>Gov. Code, § 65858</td>
</tr>
<tr>
<td>Limit on the number of newly constructed housing units</td>
<td>The adopted limits are in the public health, safety, and welfare to justify reducing the housing opportunities of the region</td>
<td>Gov. Code, § 65863.6</td>
</tr>
<tr>
<td>Limitation on second units within single-family or multifamily zoned areas</td>
<td>The ordinance may limit housing opportunities of the region and that specific adverse impacts on the public health, safety, and welfare that would result from allowing second units within single-family and multifamily</td>
<td>Gov. Code, § 65852.2(c)</td>
</tr>
</tbody>
</table>
Local Modifications to the California Building Standards Codes

| Modifications or changes are reasonably necessary because of local climatic, geological or topographical conditions |
| Health & Saf. Code, §§ 17958, 17958.5 & 17958.7 |

Open Space Zoning Ordinance

| Consistent with Open Space Element of General Plan |
| Gov. Code, § 65566, 65567 |

Specific Plan Adoption/Amendment

| Consistent with the General Plan and any applicable Specific Plan; |
| Gov. Code, § 65359 |

Zoning Ordinance

| Consistent with General Plan and any applicable Specific Plan |
| Gov. Code, § 65359 |

Legislative deference will not excuse municipalities from precise compliance with applicable statutory requirements. Courts have invalidated ordinances for failure to adopt the specifically required findings. (See Hoffman Street, LLC v. City of West Hollywood (2009) 179 Cal.App.4th 754; Bldg. Indus. Ass’n of the San Joaquin Valley v. City of Fresno (2008) 2008 Cal. App. Unpub. LEXIS 6806; Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 636.) For example, interim ordinances are frequently at issue and the subject of litigation. Government Code § 65858 permits a municipality to adopt an interim ordinance that temporarily halts development approvals and building permits when necessary to protect the public health, safety, or welfare. In order to enact such an ordinance, the municipality must make certain statutory findings. (Gov. Code, § 65858, subd. (c).) If a municipality chooses to extend the interim ordinance, and the contemplated extension would have the “effect of denying approvals needed for the development of projects with a significant component of multifamily housing” the ordinance cannot be extended unless additional specific findings are made. (Gov. Code,
§ 65858, subd. (c)(1)-(3).) The statute also specifically states that the additional findings must be “supported by substantial evidence on the record.” (Gov. Code, § 65858, subd. (c).)

In Hoffman Street, LLC v. City of West Hollywood, the Court of Appeal invalidated West Hollywood’s interim ordinance because the City did not make all of the necessary findings when it extended the interim ordinance. (Hoffman (2009) 179 Cal.App.4th 754.) In 2007, the West Hollywood Council enacted an interim ordinance restricting development in areas zoned for multi-family residential uses. The ordinance included findings stating that the increase in developments with fewer and larger units was “posing a current and immediate threat to the public health, safety and welfare.” The findings also included a stated purpose of seeking to increase both the number and the affordability of multifamily housing units in development projects in areas zoned for multifamily housing. After the initial 45-day moratorium, the city council adopted an extension of the interim ordinance. The extension contained some of the same findings and the need for affordable housing. However, the Court found the City’s actions insufficient because the extension did not contain the additional specific findings required by Government Code § 65858, subdivision (c)(1)-(3). This decision reminds local agencies, that although courts will defer to legislative determinations and factual assertions, strict compliance with the applicable statutory findings is necessary.
IV. Legislative Findings Within Context of Constitutional Rights

Case law has made legislative findings for regulations involving constitutional issues a practical necessity. In this setting the litigation stakes are usually elevated and a misstep may subject the city to a claim for attorneys’ fees under 42 U.S.C. § 1988.

Judicial deference to legislative actions will not prevent a court from exercising its independent judgment on facts set forth that have a bearing on constitutional rights. (Sable Communications of California, Inc. v. FCC (1989) 492 U.S. 115, 129.) When reviewing legislative findings related to a constitutional right, a court will seek to ensure that the legislative body has, “drawn reasonable inferences based on substantial evidence.” (Turner Broad. Sys. v. FCC (1994) 512 U.S. 622; Professional Engineers v. Department of Transportation (1997) 15 Cal.4th 543, 569.) Because there is a higher bar for legislative acts when constitutional rights are at stake, courts will often allow the introduction of evidence at trial to question the legislative fact finding. (People v. McKee (2010) 47 Cal.4th 1172, 1206.)

Each type of legislative action should have findings tailored to that specific action. Accordingly, it is important to understand the underlying constitutional tests in order to craft appropriate findings. Highlighted below are some of the most commonly legislated areas and their applicable constitutional standards to follow when crafting legislative findings.
A. Solicitation/Speaker Permitting Ordinances

All First Amendment regulations must satisfy the constitutional test that was set forth in *United States v. O'Brien*, supra, 391 U.S. 367. In *O'Brien*, the Supreme Court held that the prohibition of burning a draft card was a proper governmental exercise of authority despite the expressive conduct involved in the act. (*O'Brien*, supra, 391 U.S. 367.) The three part *O'Brien* test establishes that regulation of expressive conduct will be constitutional if:

1. it is within the constitutional power of the government;
2. it furthers an important or substantial governmental interest unrelated to the suppression of free expression; and
3. the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

(*Id.* at 377.) The Supreme Court found that running an efficient selective service was a significant interest and the prohibition on mutilation and destruction of draft cards was narrowly tailored to only prohibit the noncommunicative conduct of destroying a draft card. (*Id.* at 382.) Cases after *O'Brien* have recognized a number of significant government interests. For example, courts have routinely recognized that a municipality’s goals in adopting an ordinance regulating competing uses of public fora, maintaining public places in an attractive an intact condition and regulating streets and sidewalks to protect and insure safety, comfort or convenience of the public, are all
substantial government interests. (Long Beach Peace Area Network v. City of Long Beach (9th Cir. 2009) 574 F.3d 1011, 1025.)

While courts take a more exacting view when ordinances implicate constitutional rights, courts will nonetheless rely on the legislative findings made (and the judgment of local agencies) if they are reasonable and based on substantial evidence. For example, in a recent United States District Court decision regarding an ordinance regulating vending at the Venice Boardwalk, the Court specifically relied on the legislative findings in the ordinance to uphold provisions in City of Los Angeles’ ordinance regulating vending at the Venice Boardwalk. (Dowd v. City of Los Angeles, USDC, Central District, Case No. CV 09-06731, August 7, 2013.) In upholding key portions of the ordinance, Judge Pregerson quoted the City’s factual findings in full relating to the limited space on the Venice Boardwalk and problems that arose from the unregulated vending and accepted the findings as evidence of a significant government interest. (Ibid.)

B. Adult Oriented Businesses

There has been a significant amount of litigation surrounding adult oriented business, and as a result, it is often cited in other areas of constitutional law. Accordingly, it is a good body of case law to look to for legislative standards and general constitutional principles. The U.S. Supreme Court established a three part test in the seminal case of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41. First, does the ordinance ban adult facilities altogether? If not, it will be considered a time, place manner restriction. Second, is the regulation content neutral or content based? If it
regulates secondary effects, it is considered content neutral, but if it targets adult oriented facilities based on their content, then it is considered content based. Content-based regulations are subject to a strict scrutiny standard and rarely pass constitutional muster. Content-neutral regulations, however, are subject to a more lenient, intermediate-scrutiny standard, and are more often upheld. Third, is the ordinance designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available? When demonstrating compliance with this constitutional standard, a city must rely on evidence that is “reasonably believed to be relevant to the problem that the city addresses.” (Renton at 51-52.) The evidence relied on by a municipality must fairly support the municipality’s rationale. Courts will give municipalities the opportunity to try new approaches, but they must relate to the municipality’s lawful purposes. Evidence relied upon does not need to be new, independent studies. (See City of Los Angeles v. Alameda Books (2002) 535 U.S. 425.) Legislative findings should be tailored to demonstrate that an ordinance satisfies the three-part Renton test.

If a municipality establishes a reasonable rationale for an adult regulation with the findings, then the burden shifts to the plaintiff to show that the findings are not proper. In order to do this, the plaintiff must cast direct doubt on the city’s rationale. (See Alameda Books, Inc. v. City of Los Angeles (9th Cir. 2011) 631 F.3d 1031.) Further, the plaintiff must offer actual and convincing evidence. If a municipality sets forth multiple rationales, a plaintiff must cast direct doubt on every rationale before burden is shifted back to municipality to prove the constitutionality of an ordinance. (Ibid.; see also
C. Establishment Clause/RLUIPA

The First Amendment of the United States Constitution provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” The United States Supreme Court has used a three-prong test to determine whether a government action violates the establishment clause. A government law or action is constitutional if it: (1) has a secular purpose; (2) has an effect that neither advances nor inhibits religion; and (3) avoids excessive entanglement with religion. (\textit{Lemon v. Kurtzman} (1971) 403 U.S. 602, 612-13 [“the Lemon test”].) Any local ordinances that implicate the establishment clause should include well-reasoned findings that demonstrates satisfaction of this test.

In addition to establishment clause considerations, when regulating religious institutions, such as churches, synagogues and mosques, local governments must also be cognizant of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”; 42 U.S.C.A. §§ 2000cc et seq.). RLUIPA is intended to preserve the religious exercise provisions afforded by the First Amendment in the context of state and local land use regulations. RLUIPA prevents municipalities from imposing or implementing a land use regulation in a way that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government can show that the imposition of the burden furthers a compelling government interest and is the least
restrictive means of furthering that compelling government interest. A land use ordinance is considered a substantial burden when it is oppressive to a significantly great extent. (*Guru Nanak Sikh Society of Yuba City v. County of Sutter* (9th Cir. 2006) 456 F.3d 978, 988.) RLUIPA also contains an equal terms provision and this has lead to much litigation attempting to ferret out the land use comparator that municipalities must show when examining land use designations for religious assemblies versus other places of assembly. (*See: Civil Liberties for Urban Believers v. City of Chicago* (7th Cir. 2003) 342 F.3d 752; *Centro Familiar Cristiano Buenas Nuevas & Jorge Orozco v. City of Yuma* (9th Cir. 2011) 651 F. 3d 1163.) Findings calling out the reasoning process of the City in its treatment of its land use distinctions are critical. The issue of permissible sites in the adult arena context may prove useful in drafting same. The statutory requirements of RLUIPA should be addressed in the findings of any applicable ordinance that may affect the exercise of religion.

**D. Sign Ordinances**

Signs and billboards are recognized as commercial speech that contain expressive conduct within the commercial speech. Billboard or sign communication cannot be misleading or false, but even if these requirements are met, a municipality still has certain constraints on its regulatory powers. (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n* (1980) 447 U.S. 557, 564.) In order to pass constitutional muster, an ordinance relating to signs must: 1) seek to implement a substantial government interest; 2) directly advance that government interest, and 3) reach no further than necessary to accomplish
their objectives. (Central Hudson, supra, 447 U.S. 557.) Further, an ordinance cannot favor noncommercial speech over commercial speech. (Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 513.) Findings function as a critical tool to demonstrate satisfaction with the constitutional requirements applicable to sign regulations. If a finding only provides “ineffective or remote support for the government’s purpose,” a court may not find that the municipality is “directly advancing the government interest” and the legislation is susceptible to being invalidated. (Id. at 564.) Thus, the role of findings becomes critical to show that the ordinance is “directly advancing” the government interest. Accordingly, local governments will need to use legislative findings to give the court a clear understanding of why any sign regulations contain certain exceptions.

E. Decorum

Courts have recognized that city council meetings are limited public forums. (White v. Norwalk (9th Cir. 1990) 900 F.2d 1421, 1425.) Accordingly, a city council can enact time, place, and manner restrictions to further its governmental interest in conducting business and running a meeting. (Norse v. City of Santa Cruz (9th Cir. 2010) 629 F.3d 966, 976.) Further, a municipality can regulate the content of speech when enacting rules of decorum, as long as the content-based regulations are viewpoint neutral and enforced that way. (Ibid.) Recently, the City of Costa Mesa’s ordinance regarding decorum at a public meeting was overturned by the 9th Circuit Court of Appeals. (Acosta v. City of Costa Mesa (9th Cir. 2013) 718 F.3d 800, 811; see also Norse v. City of Santa
Cruz (9th Cir. 2010) 629 F.3d 966, 976.) The Ninth Circuit found the ordinance to be unconstitutionally overbroad because it prohibited insolent behavior by someone attending the meeting even if such behavior did not actually cause a disruption of the meeting. Thus, an ordinance regarding the decorum of a city council meeting will not be facially overbroad if it only permits a presiding officer to eject an attendee for actually disturbing or impeding a meeting.

V. Conclusion/Recommended Practices

In closing, here are some general take-away recommendations to keep in mind when advising a City Council on the preparation of legislative findings:

1. **“Why?”** – All ordinances (and legislative findings) need to start here. This basic question provides the foundation for crafting the ordinance and appropriate findings. Having a strong understanding of the “why” behind ordinance (otherwise known as the government purpose) will allow the municipality to prepare appropriate evidence that will withstand challenges.

2. **Connectors** – Utilize connectors, such as, “because” so that the findings are tied to the recommended action. When reviewing findings, utilize connectors as often as possible. This will help to bring the legislative findings to life. It will also simultaneously help to avoid the pitfalls of boilerplate, conclusory findings.

3. **Statutorily Required Findings** – Draft findings that specifically respond to the applicable statute.
4. **Cite to Relevant Evidence** – Evidence used to support legislative findings which reflect factual determinations, if available, should be placed in the record and retained.

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