



CITY OF POWAY

MEMORANDUM

TO: Honorable Mayor and Members of the City Council

FROM: Lisa A. Foster, City Attorney *laf*

DATE: February 24, 2010

SUBJECT: Due Process Requirements for City Council Decisions Affecting Property Rights - Application to the Pending WalMart Expansion Decision

Question Presented

What steps can the City Council take to ensure that an applicant's due process rights are protected in a controversial land use matter such as the WalMart expansion, when the Councilmembers are being asked to meet with interested parties and to commit to a decision prior to the public hearing?

Short Answer

In order to safeguard the City Council's ultimate decision in a controversial land use matter from a due process challenge, it is recommended that City Councilmembers avoid meeting with interested parties prior to the public hearing, avoid committing to a decision prior to the public hearing, and provide all documents and other evidence that they receive to the City Clerk so that it can be made a part of the record for the public hearing. Additionally, it should be noted that in an election year, City Council candidates who take a strong public position regarding a particular land use matter are at risk for being disqualified from participating in that matter if elected to the City Council.

Introduction

Recently, the City Council has received numerous inquiries from constituents regarding the proposed WalMart expansion project, including requests to meet with constituents, requests to consider information provided by constituents, and requests to state a position for or against the proposed project prior to any public hearings. The purpose of this memorandum is to alert you to the legal issues that are associated with these requests because of the constitutional rights of due process that the City must provide to the applicant.

The issue of due process is not unique to the WalMart project. The right to due process applies to many of the land use matters that come before the City Council because

those decisions affect the applicants' property rights. However, because of the high level of public interest in the WalMart expansion, and the fact that this public involvement is occurring long in advance of any public hearings, it is especially important to keep due process considerations in mind when weighing requests from the public regarding this project. By doing so, you will ensure that the ultimate decision made by the City Council regarding the WalMart expansion will not be vulnerable to a legal challenge.

Analysis

1. Types of City Council Decisions which Require Due Process – "Quasi Judicial" Decisions

Most City Council decisions can be classified as either "legislative" or "quasi-judicial". Legislative decisions are those that create new rules of broad application, or apply policy choices to a broad class of persons, such as adoption of an ordinance, or adoption of a general plan. Quasi-judicial decisions involve individual applications (generally land use applications) that are being considered for approval. Quasi-judicial matters involve application of established standards to individual parcels, and often require findings. Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511.

The rights of due process that are discussed in this memorandum apply only to quasi-judicial decisions involving individual applications for approval. This is because the due process guarantees of the fifth and fourteenth amendments to the U.S. Constitution, and article I, sections 7 and 15 of the California Constitution, are based on the concept that no one may be deprived of his or her property without due process of law. Therefore, due process rights only apply when a particular applicant has property rights at stake in the City Council's decision.

California courts have characterized the following types of decisions as quasi-judicial:

- Granting use permits (Johnston v. City of Claremont (1958) 49 Cal. 2d 826, 834);
- Granting zoning variances (Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 517); and
- Approval of tentative subdivision maps (Horn v. County of Ventura (1979) 24 Cal. 3d 605, 614).

By contrast, the following types of actions have been characterized as legislative:

- Adoption of a general plan (O'Loane v. O'Rourke (1965) 231 Cal. App. 2d 774, 785);
- Amendment of a general plan (Yost v. Thomas (1984) 36 Cal. 3d 561, 570); and
- Zoning measures of broad application (San Diego Building Contractors Ass'n v. City Council (1974) 13 Cal. 3d 205, 212).

The WalMart expansion decision is a quasi-judicial decision involving an applicant with due process rights, because it involves City Council approval of a revision to WalMart's existing Development Review (DR 90-12).

2. Due Process Requirements

The California Supreme Court has determined that due process in the administrative setting requires notice of the proposed action, the reasons for the action, a copy of the materials on which the action is based, and the right to respond "before a reasonably impartial, noninvolved reviewer." Burrell v. City of Los Angeles (1989) 209 Cal. App. 3d 568, 581. The Burrell court also discussed the due process requirements of federal law, which are:

- notice of the proceeding;
- disclosure of evidence;
- the right to present witnesses and confront adverse witnesses;
- the right to be represented by counsel;
- a fair and impartial decision maker; and
- a statement by the fact finder disclosing the evidence relied on and the reasons for the decision. 209 Cal. App. 3d at 577.

Of these due process requirements, the ones that are potentially violated by communications between the City Council and constituents (or the applicant) outside the hearing process, otherwise known as "ex parte" communications, are 1) the right to an impartial decision maker; and 2) disclosure of the evidence.

a. Impartial Decision Maker/Bias

Due process requires in a quasi-judicial proceeding that the decision maker be fair and impartial. A personal interest or involvement in the outcome of a matter or with any participants requires disqualification. Fairfield v. Superior Court, (1975) 14 Cal. 3d 768; Mennig v. City Council, (1978) 86 Cal. App. 341. This doctrine precludes participation by a decision maker who has been demonstrated to have "an unacceptable probability of actual bias, such as through prejudgment". Nasha v. City of Los Angeles, (2004) 125 Cal. App. 4th 470; Cohan v. City of Thousand Oaks, (1994) 30 Cal. App. 4th 547; Clark v. City of Hermosa Beach, (1996) 48 Cal. App. 4th 1152, Stivers v. Pierce 71 F. 3d 732 (9th Cir. 1995). Decision maker bias can take a number of forms, including having a personal interest in the outcome of a decision; a strong animosity or loyalty toward an involved party; or the receipt of information outside the hearing process that causes the decision maker to have a closed mind toward evidence produced at the hearing.

For example, in Nasha v. City of Los Angeles, approval of a subdivision project by the Planning Director was appealed to the Planning Commission by an environmental group. Shortly before the Planning Commission hearing, one of the City's Planning Commissioners authored an article hostile to the project, which stated that it was a threat to a wildlife corridor. The Commissioner also had contacts with project opponents outside the hearing process. At the Planning Commission hearing, where the project

was rejected 3-1, the Commissioner did not disclose his authorship of the article, or his contact with project opponents. The court found that the Commissioner had shown an "unacceptable probability of bias," which tainted the decision and required that it be vacated.

In another case on the subject of bias, Clark v. City of Hermosa Beach, a resident (Mr. Benz) who opposed a condominium project in his neighborhood when it was heard by the Planning Commission, was later elected to the City Council. The project approval was then appealed to the City Council. In addition to Mr. Benz's opposition to the condominium project at Planning Commission, there was other evidence in the record of a personal animosity toward the applicant by Mr. Benz. The City Council voted to deny the project, with Mr. Benz participating in the decision. The appeal court found that the applicant was denied a fair hearing because Mr. Benz was personally embroiled in the dispute, and not a disinterested, unbiased decision maker.¹ This case illustrates that even a candidate for City Council has the potential for being disqualified from participating in a matter if he or she has taken a strong stand on that particular matter (as opposed to expressing general policy positions) prior to being elected.

By contrast, the California Attorney General's office determined that a city councilmember was not disqualified from participating in a decision about a land use project on the basis of bias because he had signed a petition opposing the project. That office opined that by signing the petition, the councilmember had only expressed a "preliminary opinion", and that it did not preclude him from duly considering the evidence at the hearing, or impair the applicant's opportunity to be heard. 78 Ops. Cal. Att'y Gen. (1995). This opinion illustrates the fine line that exists between conduct that will be deemed to present an "unacceptable probability of bias," and conduct that does not. The analysis of bias will turn on the particular facts of a situation, and the outcome of that analysis is not entirely predictable. Therefore, it is best to avoid the appearance of bias and the risk of a challenge by remaining neutral regarding the matter until all of the evidence has been presented.

b. Disclosure of the Evidence

The decision maker in a quasi-judicial matter cannot consider anything as evidence that was not disclosed at the hearing where all parties were present. A hearing requires that the applicant be apprised of the evidence considered so that the applicant has an opportunity to refute, test, and explain the evidence. English v. City of Long Beach (1950) 35 Cal. 2d 155, 158.

Therefore, members of a City Council must disclose any evidence that they have considered in reaching their decision at a quasi-judicial hearing. If prior involvement in the process affects a councilmember's decision on a project, such as contact with third parties outside the hearing process, due process rights are violated if such evidence is

¹ It should be noted that the court also found that Mr. Benz also had a common law (noneconomic) conflict of interest which disqualified him from participating in this matter, because of the personal effect of the project on his residence, although he did not have a financial conflict of interest under the Political Reform Act as a month-to-month tenant. 48 Cal. App. 4th at 1171.

not disclosed. In Bank of America v. City of Long Beach (1975) 50 Cal. App. 3d 882, the court overturned a City Council decision because the Council's reliance on reports that were not received in evidence deprived the applicant of a fair hearing. This principal has even been applied to observations of a site which were not disclosed on the record. Safeway Stores, Inc. v. City of Burlingame (1959) 170 Cal. App. 2d 637.

c. Consequences of a Due Process Violation

There are significant consequences if a court finds that an applicant's due process rights have been violated, for reasons such as decision maker bias or failure to disclose evidence. Such a finding can result in the setting aside of the decision pursuant to Code of Civil Procedure section 1094.5, and potential award of damages, costs and attorney's fees pursuant to 42 U.S.C. sections 1983, 1988.

3. Recommendations for Responding to Public Requests Regarding the WalMart Expansion

Based on the information discussed above, the following are my recommendations with regard to the WalMart expansion matter, and any other quasi-judicial matters in which the applicants are entitled to due process rights:

- All Evidence Should be Placed on the Record

Any documents or other tangible materials provided to City Councilmembers by project applicants or project opponents outside of the public hearing should be provided to the City Clerk so that they can be made a part of the public record of the hearing on the matter. Non-documentary evidence received outside the public hearing, such as meetings with parties or site visits, should be verbally disclosed on the record at the public hearing.

- Decision Makers Should Avoid Meeting with Parties About Controversial Land Use Matters

It is common for Councilmembers to meet with constituents regarding matters of interest in the community, and as a Councilmember you may even feel that you have a duty to meet with constituents and applicants on request. However, you should consider declining to meet with parties regarding controversial land use matters, where the meetings could result in a claim of bias or prejudice, or of failure to disclose evidence. In the case of controversial land use matters, such as the WalMart expansion, I recommend that you decline to meet with interested parties and instead ask them to present their information or concerns in a letter to the full Council, or by participating in a neighborhood meeting and/or City Council public hearing. This will ensure that all information that is considered by you as a decision maker is presented on the record, and in a way that allows the applicant or opposing party a fair opportunity to respond to the information.

- Decision Makers Should Avoid Prejudging the Matter or Taking a Public Position on the Matter Prior to the Public Hearing

Although constituents or an applicant may put pressure on you as Councilmembers to commit to a position for or against a project such as the WalMart expansion prior to the public hearing, it is important that you do not pre-commit to a decision, or make any comment that could be interpreted as taking a position about a particular land use project, prior to the public hearing.

In any case where a Councilmember has taken a public position of support or opposition prior to the public hearing, or if for any reason a Councilmember believes that he or she cannot be fair, that Councilmember should abstain from participating in the decision.

- Decision Makers Should Be Present for All of the Evidence

Another fundamental aspect of due process is that anyone involved in making the decision must have heard all of the evidence. This can be an issue if a Councilmember is absent at one meeting where evidence is presented, and the final decision is postponed to a later meeting. If such an absence is unavoidable, the absent Councilmember should review the tape or testimony from the earlier meeting and read all of the relevant documents, and state on the record the steps taken to review the relevant evidence prior to participating in the final decision.

Conclusion

Because of the due process rights that must be afforded to the parties in land use matters such as the WalMart expansion, these matters require particular attention to issues such as avoiding the appearance of bias, providing a fair hearing, and basing the decision solely on evidence in the record. A cautious approach is warranted in the case of the WalMart expansion project, given the amount of controversy that has been generated about this project, and the City's interest in safeguarding the ultimate decision on this matter from a legal challenge.

Please feel free to contact me if you have any questions.

cc: Penny Riley, City Manager
Linda Troyan, City Clerk
Robert J. Manis, Director of Development Services