



Everyday Ethics for Local Officials

Being Less Than Fortright About an Agency's Decision: The "Conditioning-a-Project-to-Death" Example

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QUESTION

I am a recently appointed planning commissioner. There is a "big box" proposal coming before the planning commission in a few weeks (it requires an amendment to the general plan as well as a zone change). Some council members and I have been discussing a strategy of proposing extensive conditions on the city's approval of the project – thus dooming the project to failure without putting the city in the position of turning the project down. (This project proponent has sued the city in the past when it doesn't get what it wants.) One council member said that she felt this approach was unethical. I was a bit taken aback; it never occurred to me to look at this as an ethical issue. Do you see any ethical issues associated with such an approach?

ANSWER

This is an issue that was discussed at a recent session on ethics at the League's Planners' Institute. This Institute for Local Self Government organized this session for the Planners Institute at the request of the League's Planning and Community Development Department.

The consensus was that such an approach was ethically problematic for a number of reasons. The panel applied the WIPLA framework – an acronym for whole community, individual rights, process, legal considerations and alternatives – that has been presented in past *Western City* articles-- to guide its analysis.

Whole Community

Because the project is inconsistent with the community's existing planning framework, this element of the analysis can be straightforward--particularly if your general plan is up-to-date and reflects your community's input. Being inconsistent with both the general plan and zoning for the site is enough to turn the project down.

Of course, there may (and usually are) be countervailing policy considerations. The proposal may bring jobs and tax revenues to the city. If these are sufficiently important concerns for a city, there is an argument that the planning documents (which are intended to serve as the

"constitution" for land use development in a community) should be updated to reflect those priorities. This also avoids putting the city of making ad hoc decisions; ad hoc decision-making is arguably antithetical to the notion of sound land use planning.

Individual Rights

A key ethical difficulty of the "conditioning the project to death" approach is that it does not respect of the individual rights of the project proponent. As one participant in the Planners' Institute discussion noted, "developers have rights too." If the city has a lawful basis on which to turn the proposal down, both the developer's and the city's interests are better served by the city simply being straight with the developer. There is no shame or lack of sophistication associated with simply telling the project proponent that the city likes to stick with its land use planning framework.

Process

This problem raise at least three issues related to process: including an analysis of public expectations, a query into open meeting laws and a basic understanding of how the planning commission interrelates to the city council.

What will the public think? From a process standpoint, all of the machinations associated with the "conditioning a project to death" strategy may also turn the public off. Although it may put appointed and elected decision-makers in the heady role of being deal-makers, it sends a mixed message to those citizens who helped develop the general plan and other landowners who have complied with the city's planning regulations.

Is there a Brown Act issue? Your query does not indicate how many council members are involved in the discussions of this strategy. Whenever decision-makers talk among themselves about an issue before the city, it is important to be mindful of the Brown Act's open meeting requirements. These require that discussions among a quorum of the council and decisions be made in public.

The Brown Act may have been violated if you talked to three different council members or you talked to one council member, who talked to another council member, who talked a third. The issue is whether a collective concurrence about a strategy developed.

Wholly apart from the requirements of the Brown Act, the public and others may get the impression that backroom deal making is occurring. Such an impression will erode the public's faith that the city is conducting its business in a manner that is open to public scrutiny and input.

The Planning Commission's Role and Relationship to the City Council. This scenario raises another issue concerning the relationship between the planning commission and the city council. The panelists at the Planners Institute felt that such strategizing between the planning commission and city council was inconsistent with the planning commission's role as an objective implementer of the city's existing policies. In general, the city council has approval authority over planning policy changes—not the planning commission.

Legal Considerations

Legally, such an approach could be risky as well. Courts have shown an increasing inclination to second-guess local decision-makers' judgment—particularly when the court has the sense that a project proponent has been "jerked around" by a government entity. Sometimes the courts have even deviated from well-established law to find legal problems with a regulatory approach that just does not seem to be fair. And land use attorneys can be very clever in their briefs about emphasizing facts that make the city look arbitrary and unfair.

Consult with your city attorney about whether the safer legal strategy is for the city to simply deny the project as being inconsistent with the city's planning requirements. The project proponent may still try to intimidate the city by threatening to sue, but any suit will be much easier to defend. Don't fall into the trap of making the project proponent's lawsuit easier to win by using a strategy the courts are likely to see through and react adversely to.

Alternatives

Are there other sites that might work for the project proponent? Can the city play a constructive role in helping the project proponent connect with the owner of suitable site for the proposed project? Is there another proposed use of the site that might be consistent with the general plan that would serve the project proponent's economic objectives (and what are those objectives)? Are these issues that staff can explore with the project proponent in coming up with an alternative proposal that may create a win-win for the city and the project proponent? These were questions the panelists posed.

The Bottom Line

The panelists concluded that the conscious pursuit of a "conditioning a project to death" strategy did indeed pose a number of ethical issues for local decision-makers. Of course, a city can end up with this result inadvertently as a cumulative result of a series of concessions offered or agreed to by the project proponent. Some of the same ethical cautions about the public's perception of backroom dealing and the courts' perception of unfairness can still be relevant considerations to decision-makers who find themselves in this situation.

Sometimes, it may be worth considering whether it is just easier—and more ethical-- to stick to the standards in the community's land use planning documents. After all, these are the standards the community has said that it will apply to land use proposals.

Ethics and the Law

The Institute's board of directors and advisory panel on ethics strongly believe that the laws relating to ethics create a *floor* for ethical conduct—not a ceiling. Put another way, just because a course of action is legal, doesn't mean it is ethical.

Nonetheless, it is helpful for local officials to be familiar with what situations can create legal problems under ethics laws. To assist local officials with this endeavor, the Institute has recently published an expanded and updated version of *The Pocket Guide to Conflicts of Interest Law*.

Now entitled *A Local Official's Guide to Ethics Laws*, this new guide summarizes issues relating to

1. Public disclosure of personal economic interests (the public's right to know about local officials' personal finances)
2. Receipt of loans, gifts, travel payments and honoraria (receipt of these by public officials is limited by often-complex rules)
3. Conflicts of interest, campaign contributions and bias (these can require an official to disqualify him or herself from participating in a decision)
4. Having an interest in a contract (if an official has an interest in a contract with the official's agency, beware)
5. Dual office-holding/incompatible offices (when too much public service can be a bad thing)
6. Criminal misconduct in office (these can mean jail-time and the loss of the right to ever hold office in the state again)

All explained in one handy and easy-to-read reference guide.

The Institute for Local Self Government and its advisory panel on ethics welcomes your comments on this article and your suggestions for future ethical dilemmas to analyze. Please send them care of the Institute's executive director JoAnne Speers at jspeers@ca-ilg.org.

This piece originally ran in *Western City* magazine and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.
