

AIRPORT LAND USE COMMISSION - BOARD OF SUPERVISORS CONDUCT

Summary

Between 1995 and 2000, the Sonoma County Airport Land Use Commission (the Commission) worked diligently to update its Comprehensive Land Use Plan (the Plan) mandated by, and within the authority of, the California Public Utility Code. In the latter stages, the Commission was confronted with specious litigation, a failure of support from the Board of Supervisors, disingenuous removal and replacement of two Commission members by the Board, and a lack of legal representation due to County Counsel's conflict of interests. This report reviews the chronology of events and recommends changes in county government policies and procedures.

Reason for Investigation

The 2001-2002 Grand Jury and the prior year's Grand Jury each received a complaint about the unscheduled removal and replacement in April 2001 of two members of the Commission by the Board of Supervisors. This issue led the Jury to broaden its inquiry into the extent of the Board of Supervisors' lack of support for the Commission, its relationships with real estate developers, and the conduct of the Airport Business Center in its use of litigation to eliminate restrictions in the county's updated airport plan.

Background

In 1982, the California Public Utility Code (Section 21670) mandated establishment of Airport Land Use Commissions in each county to develop a Comprehensive Land Use Plan. The purpose of such commissions is to establish compatible regulation of land use such as building height restrictions and density of developments in the vicinity of airports.

County airport commissions consist of seven members, two appointed by the Board of Supervisors, two by the cities, two by managers of county airports and one public member appointed by the other six. The law establishes member terms of four years, but provides that (a) the appointing authority may remove a member at any time without cause, and (b) members may continue in office until replaced.

Between 1995 and 2000, the Sonoma County Commission studied and developed an update of its previous Plan to account for changing federal and state air transportation safety and traffic standards relevant to land use development. In some respects, the updated Sonoma County Plan provided for more restrictive land use development in the vicinity of airports than the previous Plan.

The EIR Issue

During the study and development of the updated Plan, the Commission analyzed the need for an Environmental Impact Report (EIR) and received advice from the Permit and Resource Management Department (PRMD) and the Office of County Counsel. The California Environmental Quality Act (CEQA) permits a Negative Declaration alternative to an EIR. During the Plan development, both County Counsel and the PRMD staff advised, after extensive analysis by the Commission, that the Negative Declaration was appropriate. In September 2000, County Counsel reversed itself and recommended preparation of an EIR in order to strengthen the Commission's position in litigation that had been threatened by a developer.

The Commission requested funding for the EIR from the Board of Supervisors. On December 6, 2000, a Board of Supervisors resolution denied such funding and stated that an EIR for the Plan was not required. Following the Board of Supervisors resolution, County Counsel advised the Commission that his office had a conflict of interests and could no longer advise or represent the Commission.

In January 2001, the Sonoma County Airport Land Use Commission unanimously approved its updated Plan without an EIR.

Litigation against the Commission

On February 1, 2001, the Airport Business Center, a private real estate development partnership, commenced legal action against the Commission and its members individually to require the Commission to prepare an EIR as part of the new Plan. On March 1, 2001, plaintiffs amended the lawsuit alleging that the Commission had violated the Brown Act by conducting an unauthorized closed session.

Due to the declared conflict by County Counsel, the Commission was left without legal representation. The Board of Supervisors did not provide alternate counsel; therefore, the Commission secured its own outside counsel on a pro bono basis.

Replacement of Commission Members

On March 6, 2001, the Chairman of the Board of Supervisors directed the County Clerk's office to post a Notice of Unscheduled Vacancy for the replacement of its two appointed members on the Commission. This directive was not the result of a resolution or other action of the entire Board of Supervisors. The notice was posted on the County Administration building bulletin board, but the two incumbent members were not notified of their intended removal and replacement. One of the incumbent Commissioners had been appointed in 1992 and the other in 1995 and both had continued in office beyond their respective four-year terms without objection.

By early April 2001, two individuals wrote to the Board of Supervisors Chairman applying for the two Commission vacancies. Neither applicant completed the Board's well-designed "Commission Application" form. They were the only applicants and neither had seen

the posted notice of vacancy but had been solicited to apply, in one instance by a Supervisor. On April 17, 2001, a Board of Supervisors resolution appointed the two new members, one of whom is a real estate developer and the other a land use attorney.

Settlement of Litigation

Following appointment of the new Commission members, the Airport Business Center withdrew its allegation of a Brown Act violation. The newly constituted Commission (including an additional replacement representing the cities) negotiated with the plaintiffs to remove certain restrictions in the updated Plan. Such restrictions would have impeded plaintiffs from developing a proposed commercial (resort) project north of the airport, unless the Windsor City Council, by a two-thirds majority, overrode the Plan restrictions.

These negotiations resulted in modifications to the previously approved Plan removing the relevant restrictions. The Commission, with three new members, voted 5-2 to approve the revised Plan, which was in accordance with the settlement of the lawsuit previously approved by a Superior Court judge. Later in 2001, the Windsor City Council approved the Airport Business Center development project.

Investigative Procedures

The Grand Jury:

1. Interviewed the following persons:
 - Eight current and former members of the Airport Land Use Commission
 - 2001 Chairman, Sonoma County Board of Supervisors
 - A County Clerk staff member
 - A PRMD staff member assigned as adviser to the Commission
 - A Windsor City Council member
 - County Counsel
 - Deputy County Counsel.

2. Reviewed the following documents:
 - California Public Utility Code, Section 21670
 - Updated Comprehensive Airport Land Use Plan (Plan)
 - Various Minutes of Commission meetings
 - PRMD staff memoranda regarding the Plan
 - Correspondence between County Counsel and the Commission
 - County Counsel memoranda regarding need for an EIR relative to the Plan
 - Commission request to the Board of Supervisors for EIR funding
 - Board of Supervisors Resolution denying EIR funding
 - Sonoma County and California Conflict of Interest Resolutions and Codes
 - Board of Supervisors, Notice of Unscheduled Vacancy on Airport Land Use Commission, dated March 6, 2001
 - Various Minutes of Board of Supervisors meetings

- Application letters from the two replacement candidates
- Resolution of the Board of Supervisors, dated April 17, 2001, appointing two replacement members to the Commission
- Forms 700 (Statement of Economic Interests) submitted by members of the Board of Supervisors and by new appointees to the Commission
- Political contributions to members of the Board of Supervisors
- Petition for Writ of Mandate filed by the Airport Business Center, February 1, 2001, against the Commission and the individual members
- Amendment to such petition filed March 2, 2001
- California Government Code Chapter 54950 – The Ralph M. Brown Act
- Settlement agreement between the Airport Business Center and the Commission modifying restrictions in the Plan
- County Counsel memoranda regarding California Code provisions for indemnification of officials.

Findings

F1. The Chairman of the Board of Supervisors ordered the posting of the notice on his sole initiative, without polling the other supervisors, based on the fact that the respective terms of the two incumbents had expired.

F2. There was no public announcement or notification of the vacancies other than the posting on the Administration Building bulletin board.

F3. The replacement of the two appointees by the Board was legally permissible under the provisions of the California Public Utility Code. The Board's appointment resolution was used as the action to remove the incumbents.

F4. County Counsel did not maintain a wall of separation between his own duty to represent the Board of Supervisors, on the one hand, and the Deputy County Counsel assigned to represent the Commission, resulting in a conflict of interests.

F5. Following the declaration of a conflict of interests by the Office of County Counsel, the Board of Supervisors took no action to provide the Commission with alternative legal representation.

F6. The litigation settlement agreement, modifying the Plan to eliminate the restrictions affecting the Windsor development project, contained nothing related to the original demand for an EIR.

F7. According to sworn testimony, the allegation of a Brown Act violation was designed to force the Commission to negotiate modifications to the Plan.

F8. Sonoma County has more than 60 commissions (or boards) to which the Supervisors appoint some or all of the members. The Board does not have a policy, nor is there a county ordinance, providing for legal defense or indemnification of commission members for personal liability arising out of acts or omissions within the scope of their designated responsibilities.

F9. The California Public Utility Code includes explicit provisions for a public agency, such as a city, to override airport plan restrictions that are inconsistent with its general development plan.

F10. Following the settlement of the litigation, eliminating the relevant Plan restrictions, the Windsor City Council approved the Airport Business Center project by a majority vote greater than two-thirds.

F11. The Grand Jury does not make any findings with respect to (a) the merits of the original Plan restrictions, (b) their removal in the revised Plan, or (c) whether an EIR or a Negative Declaration was the appropriate course of action for the Commission in developing the Plan.

Conclusions

The posting of the notice of vacancy by the Board Chairman without consultation among Supervisors defies credibility. So does the stated rationale for removal of the two incumbents at that particular time because their terms had expired. One term expired five years earlier and the other two years earlier. The Grand Jury concludes that no public announcement of the vacancies was made because the Board wished to avoid media publicity that could have generated additional applications for the positions. This facilitated appointment of replacements more sympathetic to developers who are major political contributors to several Supervisors. The Board's conduct in selecting the replacements, while legal, was not a model for either transparent governance or high ethical standards.

Once the Board rejected the Commission's request for EIR funding, County Counsel's declared conflict of interests deprived the Commission of legal representation. When the Board of Supervisors failed to provide alternative counsel, the Commission members were forced to seek representation at their own expense. The Grand Jury concludes that the Board's lack of support was unconscionable.

The Grand Jury believes the lawsuit, and especially the alleged Brown Act violation, was borderline abuse of the legal system. Although special interest groups use the CEQA and litigation demanding EIRs to accomplish other objectives, in this instance it does not reflect a high standard of legal ethics or morality. The withdrawal of the lawsuit, without further consideration of an EIR once the specific restrictions in the Plan were removed, demonstrates a lack of good faith. More reprehensible was the allegation of a Brown Act violation, without merit on its face, intended to intimidate Commission members.

Recommendations

R1. The Board of Supervisors should review its policies and procedures for the appointment and replacement of members of commissions as follows:

- Announce all vacancies in Board public sessions and routinely publish vacancies in county newspapers in a timely manner
- Require, without exception, that applicants for appointment to commissions complete the Board's existing "Commission Application" form
- Require all commission members to apply for reappointment at the end of their designated terms and adopt resolutions for reappointments in public sessions in the same manner as new appointments.

R2. The Board of Supervisors should establish a written policy for the legal defense and indemnification of members of commissions when acting within the scope of their authority, to the same extent as the government code provides for employees.

R3. County Counsel should review and reinforce its internal policies for separating representation of the Board and county departments, on the one hand, and commissions and other entities for which it has representation responsibilities.

Required Responses to Findings

None

Required Responses to Recommendations

Board of Supervisors: R1, R2

County Counsel: R3