

# WHAT HAPPENED TO LOWE'S? A CASE STUDY IN ETHICS

## SUMMARY

The Lowe's project review by the Santa Rosa City Planning commission stimulated a complaint concerning possible Brown Act violations. This California law prohibits a majority of the members of a legislative body from meeting together at the same time in private. While the Grand Jury found no evident violation of this law, it did come across other issues both legal and ethical in nature concerning whether impartial judgments are being made. In addition, possible conflicts of interest beyond those routinely considered were identified. Using the Lowe's decision as a case study, recommendations are developed which should lead to more frequent abstentions by Planning Commission members and much fuller disclosure of factors that could produce prejudiced or biased decisions. And the Lowe's decision, at the Planning Commission level, could have been different!

## REASONS FOR INVESTIGATION

A complaint raised with the grand jury whether the Planning Commission of the City of Santa Rosa made a proper decision concerning the Lowe's Home Improvement store anchored project. The communication emphasized the role two commissioners played who associated with each other not only on the Planning Commission but on the Executive Board of a private, non-profit lobbying group. That group consistently opposed the project, raised many objections to the Environmental Impact Statement (EIR), and even presented a detailed alternative development proposal unsolicited by the property owner involved. The Grand Jury, from time to time, receives complaints about a variety of high profile land use decisions. The public is skeptical or suspicious about what is going on. This report seeks to provide a detailed examination of ethical and legal issues which, if resolved, would improve public confidence in such decisions.

## BACKGROUND

High profile land use decisions in Sonoma County involve a variety of issues. Take your pick: preserving agricultural land vs. sprawling residential development, putting a garbage dump under the control of a firm allegedly insensitive to environmental issues, or building a large retail store that could put smaller, local merchants out of business. Often large sums of money are involved. Property values may soar if a planning commission allows a use for which large rents will be paid. Creating many smaller pieces of land that can be resold as buildable lots makes some developers rich. Increased property taxes can finance redevelopment districts generating all sorts of construction projects. Large retail stores yield sales taxes flowing into the unrestricted fund category in local government budgets. Obviously, planning decisions impact a wide variety of economic interests. A large national home improvement store moving to Santa Rosa would compete with locally owned stores, possibly pay workers low wages, stimulate lots of auto traffic rather than bicycle or pedestrian travel, and compete with other large stores generating sales tax revenues in a nearby municipality.

What happened in this case was that the Santa Rosa City Planning Commission reviewed an EIR. That document must adequately identify environmental impacts and thoughtfully consider a range of alternative uses for the land. Approval of the EIR is a necessary step to be completed prior to voting the proposed project up or down. Of the seven commissioners one abstained from voting or participating in the debate because she owned stock in the applicant corporation, an obvious violation of the public's right to expect decision makers to be free from obvious self interest. The remaining commissioners voted 5-1 against approving the EIR. This decision was appealed to the Santa Rosa City Council where it was overturned. The EIR was certified by the Council. The original proposal was then sent back to the Planning Commission for its consideration. At this point the applicant withdrew the proposal because of the intense opposition.

There was some rather intense debate among some planning commissioners. The one planning commissioner who voted in favor of certifying the original EIR claimed that two planning commissioners who voted against certifying were being unethical as they should have abstained from the deliberation and vote (technically called a recusal). The Grand Jury chose to look at this issue rather than the alleged Brown Act violation in the actions of two commissioners who also happened to be on the executive committee of a non-profit lobbying group. That group had opposed the Lowe's project and criticized the EIR over a substantial period of time prior to the vote.

## INVESTIGATION PROCEDURES

- Training materials used by the City of Santa Rosa for new commissioners were reviewed.
- Training materials for planning commissioners developed by the Fair Political Practices Commission were reviewed.
- Other training material found through internet search were reviewed.
- The Community Development Director for the City of Santa Rosa was interviewed.
- The planning commissioner voting in favor of the Lowe's EIR was interviewed.
- The Form 700 reports for all planning commissioners voting or abstaining on the Lowe's matter were reviewed.
- Two additional planning commissioners were interviewed concerning information on their Form 700.
- The executive director of the non-profit lobbying group with two Planning Commission Board members was interviewed.
- Minutes of that non-profit group and other documents referring to the Lowe's matter during 2008 and that portion of 2009 before the Planning Commission decision were reviewed.
  - An internet search of all Planning Commission members involved in the Lowe's matter was conducted with a focus on any interest group participation or any involvement in a political campaign.
  - Newspaper reports concerning numerous high profile planning decisions, as well as letters to the editor and editorials were reviewed.
  - A newspaper account of an ethics program proposed by the Mayor and considered by the Santa Rosa City Council was reviewed.

## FINDINGS

F-1 The required biannual ethics training program for planning commissioners and the brief training program for new commissioners are apparently insufficient and ineffective. For example, one commissioner correctly abstained from discussion and the vote on the Lowe's matter because she owned between \$2,000 and \$10,000 of the applicants stock. This amount is disclosed

on the mandatory reporting document Form 700. Another member reported that he owned from \$10,000 to \$100,000 of stock in Home Depot, which is a major competitor of Lowe's and active in the region with several nearby large stores. No recusal (the technical term for abstaining from discussion and voting) was offered by the latter commissioner.

F-2 Two planning commissioners, other than the above commissioner with the Home Depot stock, voted against the Lowe's EIR while serving on the Board of Directors of a non-profit lobbying group actively opposing the Lowe's proposal. One of those commissioners, who was chairman of the executive committee of this lobbying group, took a particularly active role. He testified about EIR issues to the Planning Commission prior to his selection as a planning commissioner. He was a leader of the task force appointed by the lobbying group to focus on the Lowe's matter. He was chairman of another lobbying group that provided coverage of the first lobbying group making it qualified for 501c3 contributions that are tax deductible. The first nonprofit lobbying group developed a presentation for the Planning Commission hearing complete with lawyer, professional planning expert, and professional graphics that cost an estimated \$100,000. This money presumably qualified as tax deductible. The first planning commissioner, on interview, said he was predisposed on the matter before the Planning Commission but open minded. He had refrained from active participation in the activity of his non profit group during the time he actually was on the Planning Commission. The records of this lobbying group are very sparse and were carefully edited before being turned over on subpoena to the Grand Jury. No activity by the special task force is described.

F-3 The second planning commissioner, also on the executive committee of the lobbying group, said that he did not participate actively in the decision of the lobbying group and was not a member of the task force dealing with the problem. No mention of recusal is made in the minutes of this lobbying group.

F-4 Several planning commissioners recognized the distinction between the quasi judicial and the legislative nature of different decisions they make on the Planning Commission. This distinction comes up in both ethics training and appeals court decisions based on common law. There was, however, no clear consensus on how to draw this distinction in the Lowe's case.

F-5 The key to "ex parte" disclosure made by all planning commissioners with whom we discussed the topic is to ensure that the same information base is available to all participating decision makers. The problem arises that highly committed participants can interpret the same information, rationalize and select from available data in a manner that fits preexisting prejudices. This decision and many other high profile decisions have long complex EIRs presenting many scenarios with much data supporting positive and adverse consequences of different courses of action.

F-6 A quorum for the seven member planning commission is four members. Any motion that passes must have four affirmative votes, so long as it concerns a legislative matter. The Lowe's application had a general plan amendment accompanying the EIR and, therefore, needed a 4-0 vote rather than a 3-1 majority. If the highly active planning commissioner and the Home Depot stock holder both recused themselves, the motion to reject the EIR would have failed to attain four affirmative votes. The Grand Jury believes that both cases have the clear appearance of predetermined decision making that on ethical, if not legal, grounds should have led to recusals. Virtually every training resource we consulted emphasized the importance of maintaining the appearance of unbiased and impartial judgment.

F-7 If the planning commissioner sitting on the Board of an organization actively lobbying on one side of a matter before the commission had recused himself, there would not even have been a quorum.

## CONCLUSIONS

No general conclusions can be proven by a case study of one Planning Commission decision. One cannot claim any general pattern for planning commissioners opposing other big box developments. Nor can one claim that these same commissioners might evidence similar conduct on other decisions.

What the Grand Jury does believe, and did find in this investigation, is that ethical issues abound which need to see the light of day. The City of Santa Rosa has an opportunity through implementing stronger ethics training to provide leadership on these issues that can illuminate practice in other cities, the County, and even the State.

## RECOMMENDATIONS

R-1 The Planning Commission of the City of Santa Rosa needs to adopt and publicize its own ethics code.

R-2 The legal counsel available to planning commissioners might consider advocating modernization of the Brown Act and conflict of interest laws to deal with circumstances in this case study. Non profit organizations containing planning commission members that make decisions in secret with organizations that normally participate in the public debate violate the spirit of the Brown Act if not the letter of the existing law. Sonoma County representatives could raise this issue in the State legislature. It certainly is the right of commissioners to be active in the political process but prejudicial commitments can also follow from such involvement that need to see more transparent disclosure. Just because one gets no salary from sitting on a non-profit Board does not mean that strong pre-decision commitments and substantial financial consequences can flow from such activities.

R-3 Whether or not contact by Sonoma County representatives with legislators in Sacramento can produce legal reform, our practice of disclosure in Santa Rosa could be enhanced. As part of the ex parte disclosure one might mention any organized group with whom the commissioner had discussed the matter under consideration. What role, if any, the commissioner took in that discussion or in facilitating a course of action by that group should also be disclosed.

R-4 The practice of running for office invites much conflict of interest that could be avoided if the local Planning Commission made it a policy that anybody running for office should not continue to service on the commission. That restriction might also apply to persons who recently have run for office. In both cases the role of campaign contributions can come into play. California Government Code Section 84308 provides some help here with disclosure and disqualification rules for contributions over \$250 going back twelve months and forward three months. An ethics code could extend this time frame and also include endorsements, either anticipated or received, that produced or could produce multiple contributions smaller than \$250.

R-5 The City of Santa Rosa Planning Commission should strengthen its ethics training programs. Make the training internal if financially necessary. Consider real life complex examples which invite thinking through cases to find applicable principles.

Responses Required:

Community Development Director, City of Santa Rosa: R-1, R-2, R-3, R-4, R-5  
The Planning Commission of the City of Santa Rosa: R-1, R-4, R-5  
Acting City Manager, City of Santa Rosa: R-1, R-5  
Mayor, City of Santa Rosa: R-1, R-5

Responses Requested:

State legislators representing Sonoma County: R-2