PUBLIC OPINION & DOC FORD'S DECISION

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May 21, 2015

Should public opinion have carried

the day in the Doc Ford's case?

By Larry Schopp, Board Member, Committee of the Islands

On April 28, the Sanibel Planning Commission approved a conditional use permit for a new Doc Ford's restaurant on Tarpon Bay Road, across from Bailey's plaza. Though the parcel has long been zoned for commercial use, restaurants are not listed as "permitted" uses. That's why a conditional use permit was required.

From the weight of public opinion expressed at the hearing, those opposed to the permit were in the clear majority. So why did the commissioners approve the application?

The answer may lie in the nature of the hearing. As the local planning agency and land regulation commission under the City Charter and Florida Statutes, the Planning Commission has two basic functions. The first is to make recommendations to the City Council about changes to the Sanibel Plan and Land Development Code, a legislative advisory function. Public opinion carries a fair amount of weight when new legislation is up for consideration, as it should, because it affects how we are to be governed.

A quasi-judicial hearing

The second is what is known as a "quasi-judicial" function. That's where the Commissioners decide cases, like Doc Ford's, involving proposed land use permits in much the same way a court would, though without the formality of an actual court case.

In quasi-judicial hearings, commissioners listen to evidence given under oath and decide whether issuance of the permit sought would be in compliance with the law -- the Sanibel Plan and Land Development Code. If they find that it would, the permit is approved. Public opinion plays a far less important role in a quasi-judicial hearing than it does in a legislative advisory hearing because quasi-judicial hearings are driven more by facts than by policy considerations.

In the Doc Ford's case, the applicant was represented by an attorney who is a land use specialist. In support of the application, he offered a professional traffic impact evaluation, a formal landscaping plan and the applicant's agreement to some twenty conditions proposed by the Planning Department staff, conditions that would help insure compliance with a wide range of issues from parking to landscaping to noise, light and odor control.

As part of its review, the Planning Department staff retained its own independent experts to look at the issue of traffic. Those experts agreed in substance with the applicant's traffic impact analysis.

Those who organized in opposition to the application were not represented by an attorney. They, along with other members of the public, were sworn in en masse and given three minutes each to make their case in no particular order. As time permitted, people were allowed to speak a second and third time. But presenting a cohesive argument in three-minute segments is hardly practical.

Though several knowledgeable speakers questioned the methodology of the applicant's professional traffic impact evaluation and even offered some data of their own, the commissioners were not provided with an alternative professional evaluation for their consideration. Looking at this case as a litigator might, I thought that was an important shortcoming.

In any court case, in order to have a level playing field, both sides are typically represented by attorneys who prepare their cases by lining up witnesses, soliciting the opinions of experts and questioning the other side's witnesses at the time of trial. A litigant who does not do that does not stand much chance of success. It's really not very different in a quasi-judicial hearing.

Another case, another result

Here's an example of how different tactics produced a different result. Some of you may recall a case several years ago involving an application to construct a very large home in the Chateaux Sur Mer neighborhood. Several of the residents felt the home would be incompatible with the character of the neighborhood, in violation of Section 86-43 of the Land Development Code, and decided to oppose the application.

However, unlike those opposed to the Doc Ford's application, the Sur Mer neighbors organized and retained an attorney to represent their interests before the Planning Commission. The result was a very different kind of hearing from the one at which the Doc Ford's application was considered.

In the Chateaux Sur Mer case, the playing field was even. Both the applicant and the neighbors were represented by well-qualified attorneys who offered expert evidence and questioned each other's witnesses. Members of the public were still given an opportunity to speak, but the outcome was determined by the evidence presented by the attorneys.

At the end of the day, the case presented by the neighbors who opposed the large home persuaded a majority on the Planning Commission that the home would violate Section 86-43 of the Land Development Code, and the application was denied.

I'm not saying the result would necessarily have been the same if those opposing the Doc Ford's application had been represented by counsel. But I'm suggesting that, if people are sufficiently concerned about an application to be considered at a quasi-judicial hearing before the Planning Commission, particularly one where the applicant is represented by counsel, they should retain counsel of their own and put on a case in opposition. Otherwise the applicant has a clear advantage, regardless of the weight of public opinion.

In legal matters, the party that presents the strongest case usually wins. That's the way the system was designed to work.

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