

- (1) the projected traffic generated by the project, combined with existing traffic, exceeds the desirable operating level established in Section 25-6-116 ... or
- (2) the project endangers the public safety.

§ 25-6-141(B). These sections of the LAND DEVELOPMENT CODE establish two principles. First, they make it clear that the Council has a role to play in the site plan and TIA review process. These sections say in plain English that if certain things are demonstrated through a TIA, the Council either “may” or “must” deny a site plan. Second, these sections establish two different duties on the Council, one discretionary and one mandatory. The Lincoln Property TIAs have and will demonstrate facts that provide the Council with both the discretionary opportunity to deny the site plan and the mandatory duty to deny it.

Mandatory Denial of the Site Plan by City Council

The Council must deny the application if the TIA demonstrates that “the project endangers public safety.” § 25-6-141(B)(2). This phrase “endangers public safety” is not an engineering term or term of art. It is not a phrase that is defined or limited by the City’s TRANSPORTATION CRITERIA MANUAL. It is a broad term. Making decisions to protect the public safety is in part what the Council was elected to do.

Because of the traffic congestion that all TIA versions have shown that will result if the Lincoln Property site plan is approved, it can hardly be disputed that the project will not endanger public safety. Anderson Lane and Burnet are already congested. To an unprecedented level, like no other project before or since, the proposed Wal-Mart would put a huge amount of additional traffic into these streets and other nearby streets. Congestion will lead to bottlenecks, slowed traffic and increased air pollution; our City already suffers from high ozone pollution from automobiles and this problem is magnified by increased idling of cars due to traffic congestion. Bottlenecks with backups from turn lanes into through lanes will endanger public safety by increasing the likelihood of accidents. Congestion also slows down EMS and Fire Department vehicles. The increased traffic that will flow into residential neighborhoods will also endanger public safety. Because the project will endanger public safety, the Council has a duty to review and deny the site plan.²

There is another factor the Council must review to determine whether it has a mandatory duty to deny the site plan. The site plan must be denied if the projected traffic on top of existing traffic would cause collector³ or residential streets to exceed desirable operating levels established by LDC § 25-6-116. § 25-6-141(B)(1). These levels range from 1,200 vehicles per day to 4,000 vehicles per day, depending on the width of the

² Of course, City staff has a duty to deny the site plan on this basis also.

³ “Collector street means a street collecting traffic from other streets and serving as the most direct route to a thoroughfare.” LDC § 25-1-21(15).

street pavement. The Council should ensure that this analysis is properly performed in the TIA and deny the application if these levels are demonstrated to be exceeded.⁴

Discretionary Denial of the Site Plan by the City Council

In addition to having a mandatory duty to deny the site plan, the Council has an opportunity to use its discretion to deny it. The “Council ... may deny” a site plan if the proposed development would “overburden the City’s street system.” LDC § 25-6-141(A). Again, the term “overburden” is not an engineering term or term of art. It is not defined or limited by the TRANSPORTATION CRITERIA MANUAL. It is a broad term that gives the City Council discretion to look at a variety of factors. Arguably, the City’s existing street system at Burnet and Anderson Lane is already overburdened. The Wal-Mart project will unacceptably strain a system already stretched thin. On this basis, the City Council should exercise its discretionary authority to review and deny the Lincoln Property site plan.

STAFF’S LEGAL INTERPRETATIONS NOT SUPPORTED BY LAW

City staff are choosing to ignore and circumvent what the LAND DEVELOPMENT CODE says with respect to review of site plans by City Council and the Code requirement of a conditional use permit. Certain members of City staff have aggressively pursued an interpretation of City Code that favors Lincoln Property and Wal-Mart⁵ and appear to have gone to extreme measures to usurp the role of City Council in the land development process. The net effect is anti-democratic -- intimidation in the service of discouraging the elected members of the governing body from fulfilling their constitutional and statutory duties as heads of City government.

Staff Interpretation of the site plan TIA requirements

Staff appear to be ignoring the decisive and clear provisions of the LAND DEVELOPMENT CODE identified above. Instead, they are focusing exclusively on what they see their duties to be under the TRANSPORTATION CRITERIA MANUAL, and in particular, the narrow question of intersection failures. This MANUAL procedure puts the developer in control in contrast to the CODE procedure, which puts City staff and the Council in control. Assistant City Manager Laura Huffman purportedly has drafted a memo that says the following:

When a traffic impact analysis projects that an intersection will fail, it is the developer’s responsibility to propose a mitigation strategy as part of the TIA A developer can propose a reduction in intensity of the proposed development to mitigate traffic. However, the developer may,

⁴ This duty adheres to City staff also.

⁵ I am not suggesting that this favoring of interpretations that help the developer and ignoring provisions that protect the larger community is necessarily unique to the Wal-Mart situation.

and usually does, propose a mitigation strategy other than a reduction in density, such as a roadway or traffic control improvement.

If City staff determines the proposed improvement adequately mitigates the impacts of development, the City cannot require the developer to reduce the density or change the types of land uses on the site as a condition of approval of an administrative site plan....

In Fact Daily (May 10, 2007). What Ms. Huffman is articulating here is based on section 2.3.5 of the TRANSPORTATION CRITERIA MANUAL. However, this MANUAL does not purport to outline the exclusive procedures and standards the City may use to reject a land use in the original site plan on the grounds of traffic. This section 2.3.5 procedure in the TRANSPORTATION CRITERIA MANUAL does not supplant the different and independent review provisions found in section 25-6-141.

The TRANSPORTATION CRITERIA MANUAL is intended as a supplement to the LAND DEVELOPMENT CODE. TRANSP. CRITERIA MANUAL § 2.1.0. It does not replace or reduce the Land Development Code. “A traffic impact analysis must conform with the requirements of [the LAND DEVELOPMENT CODE] and the TRANSPORTATION CRITERIA MANUAL.” LDC § 25-6-115(C) (emphasis supplied). Lincoln Property’s TIA and site plan must conform with the requirements of the MANUAL in addition to the LAND DEVELOPMENT CODE.

The TRANSPORTATION CRITERIA MANUAL is not law in the same sense that the LAND DEVELOPMENT CODE is law. It is primarily an engineering guide, establishing “guidelines,” and providing only “a foundation or starting point for rational engineering design standards.” TRANSP. CRITERIA MANUAL *Preface* (emphasis supplied). Section 25-6-141 of the LAND DEVELOPMENT CODE authorizes City staff and the Council to deny a site plan when the data from the engineering-derived TIA demonstrate to the Council or staff that the project would meet the general standards of endangerment to public safety or overburdensome to the existing street system.

Extraordinary Advice from City Legal Department on Consequences to Individual Counsel Members for Deviating from City Legal opinions

Not only has City staff asserted exclusive control over the site plan approval process through its misinterpretation of law, but if recent news reports are true, City staff appear to have warned Councilmembers of the prospect of personal financial harm if Councilmembers choose to interpret the Land Development Code in a manner that differs from City staff’s interpretation. In the words of Councilmember McCracken: “[W]e have been told consistently two things. One is that we do not have the power to take down or disapprove the site plan and the second is that if we try to do it we’re on our own in a subsequent lawsuit.” In Fact Daily (May 10, 2007)

According to In Fact Daily, a “memo from the City Attorney’s office advises Council Members that a vote to reject the site plan would leave the Council Members

exposed in a lawsuit in which they would be personally responsible for their own defense.” (May 11, 2007) According to the Austin Chronicle, Councilmember Kim “was warned by city attorneys that the city would not indemnify council members against being named individually in lawsuits, or cover their legal expenses, if they were sued for contract interference or taking sides.” (May 4, 2007) In addition, the City legal department purportedly told Councilmember Kim that Mayor Will Wynn and Daryl Slusher “were personally sued ... by landowner S.R. Ridge in November 2003 for working to stop Wal-Mart from building over the Barton Springs Aquifer Recharge zone.” *Id.*

If these reports of City Attorney advice are true, the Councilmembers are getting legal advice that is both frightening and wrong.

First, neither the Mayor nor Councilmember Slusher were individually sued in the S.R. Ridge lawsuit. It was a frivolous lawsuit that was dropped by the plaintiff even before the City’s summary judgment motion could be heard.

Second, Councilmembers can have no individual personal liability to Wal-Mart or Lincoln Property simply by taking a vote at a Council meeting. As individuals they cannot have liability because as individuals they cannot do Wal Mart or Lincoln Property harm. As the City lawyers argued in the other Wal-Mart lawsuit, City Councilmembers individually are not the City. It is only by collective action, a vote, that they could cause the City to do something that would cause harm; and the (frivolous) lawsuit then would be against the City, not the individuals, who have no authority and power individually. Moreover, long-recognized principles of official immunity protect elected officials in lawsuits such as the imagined Wal Mart suit here. Any suit brought by Wal-Mart or Lincoln Property based on a vote concerning a site plan review would be frivolous.

Third, and most importantly, it is not the City Legal Department or City staff who get to decide when the City provides a legal defense to its Councilmembers. It is the City Council who gets to decide that. The law is clear that a decision as to whether to the City will grant a defense to a Councilmember who has been individually sued is made by a vote of those Councilmembers who have not been sued, not by City staff. *Tex. Att’y Gen. Op. JC-0294 (2000)*. The remaining members of the Council must make a determination that providing a legal defense would serve a public interest and that the defendant engaged in the allegedly wrongful action in the good faith belief that it was within the scope of his duties. *Id.* A defense is appropriate even if the defendant was wrong about the law and ultimately loses – i.e. even though the Council’s confidence in the defendant’s good faith may prove to have been misplaced. *Id.* A Councilmember’s disagreement with a staffer on the interpretation of a City ordinance is not grounds for denying him legal counsel. Under this rule, a City is authorized to provide a defense to Councilmembers even when the Councilmembers are being prosecuted for criminal violations, such as the violations of the Open Meetings Act. *Id.*

I know of no situation where a Council member was sued for a “wrongful vote” and the City legal department failed to provide a defense. In the year 2005, Councilmember Brewster McCracken was sued by Bill Moriarty for defamation. Councilmember was accused of leaking to the press a legal memo prepared by City Attorney David Smith that allegedly contained false and defamatory statements. *Moriarty v. Futrell et al.*, No. D-1-GN-05-4557 (Travis County Dist. Ct.). The City Attorney later publicly admitted that some of the statements in the memo were untrue. If good faith exercise of official Council duties includes leaking to the press a confidential legal memo, then it can hardly be argued that taking a vote at a City Council meeting does not involve the good faith exercise of official duties. There should be no question of good faith – especially when a plain English reading of the Land Development Code grants that right and duty of review and decision to the City Council.

City staff appears to have gone to extraordinary lengths to discouraging individual City Councilmembers away from exercising their duties to interpret City ordinances and take a vote on the Wal Mart site plan. The arguments used by City staff are not well founded in the law or in fact. It is to the City Council that Responsible Growth for Northcross look to make decisions as to when a legal defense will be provided to Councilmembers and when a TIA demonstrates burden to the street system or a danger to public safety.