

SAN DIEGO PLANNING COMMISSION
THURSDAY, DECEMBER 19, 2013

CHAIRMAN ERIC NASLUND: Now let's move on to Item #2, Request for Items to Be Continued and/or Withdrawn.

MIKE WESTLAKE, DEVELOPMENT SERVICES DEPARTMENT: Good morning, Commissioners, we need to withdraw Item Number 7 which is reconsideration of the Planning Commission's motion of December 12th regarding the La Jolla Children's Pool Beach Closure. We have a Brown Act noticing issue in that the notice that went out for today's hearing went out late. We won't be able to actually hear that item until this afternoon at around 2:30, and we do not believe we will have a quorum at that time, so we'd like to withdraw that item and our plan is to put it on the Agenda of January 16th.

COMMISSIONER MICHAEL SMILEY: I'll take exception. I won't push it too hard because my reading of Robert's Rules of Order says you can put it on without notice, and....

DEPUTY CITY ATTORNEY SHANNON THOMAS: The Robert's Rules are procedural rules and then the Brown Act is a law that the body has to follow, so they don't always mesh. The revised noticed was posted at about 2:30 on Monday--

SMILEY: Like I said, I'm not going to push it. I'm familiar with the Brown Act as well and I don't recall that dealing with reconsideration motions being in there, but I'll go along with it, I-

THOMAS: You're correct, the Brown Act doesn't deal with reconsideration motions; it doesn't deal with procedure in any form. It deals with notice to the public, an opportunity for the public to participate.

SMILEY: That's kind of my point.

NASLUND: Well I think in, uh --

DR JANE RELDAN: Mr. Chairman, in light of that, I'd like to make a public comment, since there's not going to be the opportunity to speak to the motion.

NASLUND: Well, the public comment has been closed--

RELDAN: I'm sorry sir, but I really feel that this is -- we're here to consider the reconsideration by Commissioner Smiley, and I understand, Mr. Westlake, about the noticing, although Mr. Dye told me very specifically that there was no notice required, and so, uh, we have brought the public here yet again to speak to this issue about why it should not be reconsidered, and I do believe we ought to be given the consideration to speak while you are here in a quorum, please. Mr. Smiley himself is asking for that.

NASLUND: OK, so, what I'm going to say about that is that -- and, first of all, I appreciate very much that you made an effort to be here and that you invited others who want to participate and are

obviously passionate and interested in this process -- that is important, we do appreciate you coming down. However, in an abundance of caution regarding fairness to all parties, it's important that we give everyone an opportunity to hear and participate in this, because this is clearly an issue that is important to a lot of people. And given the noticing time frame that normally accompanies any action that we take, we cannot consider that until 2:30 this afternoon, we will not have a quorum at 2:30 this afternoon, we cannot do it until 2:30 this afternoon.

RELDAN: Mr. Naslund, why will you not have a quorum at 2:30 this afternoon?

NASLUND: I am not able to be here, Commissioner Golba is not here, and the other Commissioners will not be here at 2:30 this afternoon.

RELDAN: What is a quorum for you?

NASLUND: Four.

RELDAN: How many Commissioners will be here this afternoon?

NASLUND: I'm sorry -- no. You are going to conduct affairs here at the microphone. No, I'm sorry, that is not going to happen.

RELDAN: You are correct, sir, but sir, 2:30 this afternoon is not that long from now. I really feel that having a quorum here is the responsibility of the Planning Commission.

NASLUND: I understand, however, we will not have a quorum at 2:30 this afternoon. We will not be considering today, I am sorry. I am sorry you are frustrated about it. We will hear this --

RELDAN: You have heard this issue nine times. Nine times, sir.

NASLUND: I am quite aware of how many we have heard it, trust me. I would like to not hear it again at all. So, I....OK, let's uh, let's refrain here for a minute. We need to make sure that people who have an interest in this have an opportunity to at least witness how this is going to come together, and in an abundance of caution about public noticing, and about people's participation, we will not be able to hear this until 2:30 this afternoon. We will not have a quorum at 2:30 this afternoon. Therefore, this item will trail until January. We will take a motion at that time, to reconsider. Someone from the prevailing side will have to offer that, Commissioner Smiley likely is that candidate. We will see, if we get 4 votes to reconsider, we will then, at that time, come back to Commission Comment -- public testimony will be closed, we have already opened and closed public testimony on this item, we will not re-open public testimony during that process -- so I just want everyone to understand that. At that time, if that motion passes, we will have an active motion on the floor. Commissioner Haase's motion. We will likely re-vote on that motion. If that motion fails, we'll have to offer a different motion and continue to press forward. I'm very sorry for those of you who feel strongly that we need to be moving on quicker. I understand your frustration, I am sympathetic to your frustration, however, we need to make sure this is done in a way that is considerate of everyone who has an interest in this item, and needs to obey our procedural rules. So. Sir, did you have something you wanted to say?

JIM BARTELL: I'm Jim Bartell, representing the Seal Conservancy. Chairman Naslund, members of the Commission, the Brown Act is in place to protect the public's right to be properly noticed for discussion on an item of substance, and a decision or recommendation of substance. This is a procedural issue. Commissioner Smiley is just asking for this to be docketed for discussion and for reconsideration. So, I don't think the Brown Act speaks specifically to procedural issues, specifically to reconsiderations, motions of reconsideration.

THOMAS: As I stated earlier, it doesn't speak to procedure at all, it speaks to the public's right to have notice and to participate in the actions of the body, so this would be an action of the body.

BARTELL: No one's arguing that the public shouldn't have the right to speak to the issue – when it comes back, if you entertain the motion today, and it's set for hearing on January 16th when you reconvene, the public will have a chance to speak to the issue. The whole agenda, the subject matter --

THOMAS: They would have a right to speak to the motion for reconsideration, but the public comment on the project itself has been closed.

BARTELL: Well, I think people who have an interest in speaking to the motion of reconsideration are here – everyone knows that the substance of the issue isn't going to be discussed today. I don't think anyone anticipated that there would be any broad discussion of anything other than their support or opposition to the motion to reconsider the item. But to delay this even further, if we get to January 16th for the reconsideration motion, then it's another several weeks before we get to the hearing, then another several weeks before this goes to City Council--

NASLUND: No, the intention is to have the reconsideration vote on the 16th and then immediately move in to that, so we're not going to then delay that further beyond --

BARTELL: In speaking to the issue before you today, the City Attorney cannot cite something in the Brown Act, a section in the Brown Act, that requires you to notice this any more than you already have. There's no citation.

THOMAS: Well, yes, the Brown Act says 72 hours' notice of the Agenda, and that will not be met until this afternoon.

NASLUND: So that's our constraint.

BARTELL: But it doesn't speak to reconsiderations.

THOMAS: It doesn't speak to any parliamentary procedure at all because that's not the point of the Act. The point of the Act is public participation which includes notice.

BARTELL: But you have to get to the intent of the Act. The intent is to preserve the right of the public to speak to issues of substance that are going to be discussed and deliberated by the Commission or the City Council. That's the intent of it. When you look to the intent of the Brown Act, this doesn't meet the criteria for the intent.

NASLUND: Well, the point that you're getting to, which is trying to have this dealt with as early in January as possible, will still be met with the procedure that we've outlined here today.

BARTELL: So, you would double-book – double-notice – this?

NASLUND: That's the intention, yes, sir.

BARTELL: So for the 16th you'll be noticing the reconsideration motion, and noticing the potential for a public hearing.

NASLUND: That would be the idea, yes.

BARTELL: OK.

RELDAN: Mr. Dye told me that that was not allowed.

BARTELL: Can the City Attorney speak to that; can you double-notice?

THOMAS: I can't speak to what Mr. Dye said, but we certainly have discussed the possibility of putting the reconsideration item and the actual item, should the reconsideration vote pass, on the same agenda.

NASLUND: So, I think we're meeting – we're doing the very best we can relative to trying to hurry this along as fast as we can. We are doing the very best we can regarding making sure that anyone who has feeling – who has participated in the past, has the opportunity to continue to do so. And that's how we're pressing forward. We're doing the best we can regarding that. I will tell you because of prior commitments, 2:30 this afternoon will not work.

BARTELL: I understand, I'm not arguing about today, I'm just saying I don't think that the Brown Act's intent was to require you to go through what you're going through.

NASLUND: I understand that's your opinion, I appreciate and understand the logic of your opinion. That's quite certain. But I think that, as long as I have been Chair of this Commission, I have tried to always error on the side of the most participation, the most noticing, the most opportunity for the public to engage in and be a part of this, so that is where I'm heading.

BARTELL: If that's the direction you're moving today, we'd strongly request that you allow for double-noticing for the hearing on the 16th.

NASLUND: That's the intention, yes.

BARTELL: Thank you.

RELDAN: Mr. Naslund, I know I'm out of turn, but Mr. Smiley, would you consider withdrawing your motion for reconsideration?

SMILEY: No.

RELDAN: Thank you.

SMILEY: In fact, I want take this opportunity to clear something up. We seem to be merging two things here, and I want to make it clear, the motivation for my subsequent motion for reconsideration. It has nothing to do with the issues. It has to do with the confusion I had at the last meeting because of a convoluted motion, and I voted in error. It's not that I want to reconsider any of the elements of the issue. It's, I want to correct a mistake on my part. We do it routinely – not with me, this is the first time I've ever done it – but where people have pushed the wrong button or misunderstood, but they caught it right at the time that they did it, so they're allowed to -- we do a re-vote at the time. I didn't realize it until I spoke to a fellow Commissioner who explained to me, what the motion was, and that's when I immediately approached the Chair to say I made a mistake, and that's when, things followed after that, I think correctly, so I just want to clear up that we've got two things at stake, we have my motion to reconsider, to get a re-vote, and then we'll deal with the original main motion.

NASLUND: Yes, understood, and I think the, the only reason we didn't do what you said, was because I had adjourned the meeting at that point. If we had caught it before adjournment, we would have been able to deal with it immediately then and there. We weren't, so here we are. And again, I apologize for this confusion within the public about this, but given again the passion surrounding this, and the broad level of interest in the community, and outside the community, I think in an abundance of caution we want to make sure we do this in a very above-board way that allows anyone who has a participating interest in this, to be here for this reconsideration.

COMMISSIONER ANTHONY WAGNER: I'd like to request the City Attorney, now that Mr. Smiley has had oral testimony as to his state of condition in voting, if in fact he is allowed to have a re-vote. It seems as if he heard additional information from a different Commissioner, so I don't know if that's the same as an errant key strike.

THOMAS: The motion for reconsideration, which we are not hearing today, allows for reconsideration under numerous circumstances, including an erroneous vote. It allows it if new information is obtained later, which I didn't pick up on as the case but could have been the case. But the motion for reconsideration is not being heard today, and we seem to be straying an awful lot in to that territory. And I understand that part of the discussion was to explain the situation for the public's benefit since they came down here, but we've pretty much strayed off topic at this point.

NASLUND: OK, so there you have it, this item has been withdrawn today, it will be brought back on the 16th, we will endeavor to publicly notice the reconsideration and then, once reconsidered....I do have a question for the City Attorney about that. So, um, if we make a reconsideration vote, Robert's Rules places us back where we were prior to that vote, right. And therefore, I mean I think, I think it's important that we publicly notice all pieces of that, but would we not, in the absence of public notice, be able to just proceed forward because that would have essentially put us right back where we were?

THOMAS: I'm not sure what you mean by the 'in the absence of public notice, being able to proceed where you were'?

NASLUND: Well, I've heard the discussion here about that it would require two notices, one for the reconsideration, and one for the item, once it's re-opened. Assuming, again, that the vote prevails to reconsider. So, it does -- I understand the question about that, because you notice that we are going to reconsider, and then you notice that we may or may not hear it, if it gets reconsidered.

THOMAS: Correct, that was the discussion about the process and the noticing that would occur.

NASLUND: So what I'm asking is, if we -- if today, if we were able to do this, this morning, and we would have voted to reconsider and let's say a motion like that would have prevailed -- I don't know where it will go -- we would not be allowed at that moment to just pick up on where that ended was, from last week --

THOMAS: That is correct because we have to also comply with not only the Brown Act but the noticed hearing provisions, and this is a noticed hearing matter -- we were not able to do that level of noticing within the week, from last Thursday and today.

NASLUND: So we're going to be -- and this gets to Mr. Bartell's question, I think it's a legitimate one, is, are we going to be able to make a public notice that says we may or may not hear this item.

THOMAS: Um, we can certainly incorporate more information into the notice than would normally be provided.

NASLUND: It could say something to the effect that, 'The Planning Commission will be hearing a reconsideration of a previous vote. In the event that the reconsideration is agreed to, we will press forward at this point.' Is it ok to make a notice like that?

THOMAS: Yeah, that's -- more information is fine.

NASLUND: All right, that's the idea. I just want to make sure that we covered that, because I don't want to walk away from this having everyone think we're going to do this, and then find out, oops, we can't do that. So what I just heard is that we can do that. **So for those of you who are here today for that, the reconsideration will happen on January 16th. We will move forward on January 16th. In the event that that motion carries and we reconsider, at that moment, we will be back to Commission Comment. Public testimony will be closed at that point. You will be able to testify on the issue of reconsideration, because that will be the first vote, so you can put a speaker slip in for that, but we won't be carrying forward with more public testimony on the actual item, in the event that that motion carries, so likely we will be able to -- no, not likely -- we will hear this on the 16th, we will take a vote, we will then proceed immediately in the event that that motion carries.** So does everybody understand that?

RELDAN: When does it get to City Council?

NASLUND: I can't answer that question.

RELDAN: Can the Attorney answer that, please?

THOMAS: No, I can't answer that question either, that's done in consultation with the Council President's office and their legislative calendars.

NASLUND: I guess what I would do is communicate with them.

MAN'S VOICE: I'm sorry, what was the question?

THOMAS: When it would get to Council.

NASLUND: So my advice is to speak to whoever it is on the Council side who docket these things and try to understand a little more about that, I can't speak to that, I don't know.

ADRIAN KWIATKOWSKI: I'm sorry, Mr. Chairman, just so I understand, so if the motion carries for reconsideration and the Planning Commission engages in a conversation on the subject again, are you saying that public comment on the second conversation is closed still?

NASLUND: Yes, that's right, because we will essentially be back in to that item, we will have spooled time back to the point where we were when that motion was made and voted on, so we will be back with an active motion on the floor --

KWIATKOWSKI: I understand.

NASLUND: ...that would then have to be voted on, and if that fails, we will have to float a different motion at that moment.

KWIATKOWSKI: Is there any way to allow public comment from both sides on that issue?

NASLUND: My preference would be to not do that. I have already opened and closed public testimony. I've been really clear here today that I've closed public testimony about that piece. So the idea is to again get this recommendation off to City Council as quickly as we can, so, I don't know that there would be any additional information available --

KWIATKOWSKI: There were some misinformation at the hearing last week that people would like to clarify, related to specific dates for seal pupping season, they are not just open to interpretation, there are some guidelines, but I know I'm stepping out of the boundaries here, I just wanted to know if there'd be an opportunity.

NASLUND: Yeah, OK, I appreciate that. OK, is everyone clear on that, we are withdrawing Item #7, **we will hear it on the 16th, we will notice also that in the event that the reconsideration prevails, that we will continue on with the item as we had discussed and we will try to get to that resolution.** Again my apologies for making this seem convoluted but again, it's an attempt really to make sure that we're fair and open about the process here as we could possibly be. So—

RELDAN: (inaudible)

SMILEY: Chairman Naslund, I just have one thing maybe to clear things up for the people who are here now. If – there's a couple if's here -- if the reconsideration motion passes and the subsequent re-

vote disapproves the motion on the table and there's a new motion, then I would expect maybe public comment would be allowed on the new motion, or am I incorrect on that?

NASLUND: You're incorrect--

WAGNER: Mr. Chairman, I implore our body to stop talking about this, because obviously if we've not had enough time to notice it, the last 35 minutes is a conversation that has not been duly noted, so, uh, forgive me sir, that I just request that we move along.

SMILEY: This is why we are discussing it -- we are discussing it lest that some Commissioners speak on a single issue in the past. So I think we need to stop with an understanding -- that everybody is on the same page with an understanding. That's all I'm driving at, for the sake of the people who are in the audience who came here for a particular reason, so that they know what the expectations are at the next meeting, that's all I want to do, is make it clear.

NASLUND: Yes, understood. And, Commissioner Wagner, I appreciate your concern about this, we want to make sure that we are not conducting business outside of our public notice, I agree completely. And to draw this to a close, we have heard all the public testimony, we have heard all the facts, we have read all the reports, none of those situations have changed. There is some....uh, there is some concern that information in public testimony would not have been correct, or would have been misstated. That happens every single time we hear an item, so that doesn't change the consideration from my perspective. We are in Commission Comment at that time—Commission consideration—we will press forward with that. You are certainly allowed to invite any speakers to come to the microphone to clarify a point or to understand more, as a Commissioner. So with that, that item is withdrawn and we are going to move on to Item #3, Request for Items to Be Placed on the Consent Agenda.