




TO: Council Member Morrison

FROM: David Allan Smith, City Attorney 

DATE: May 18, 2010

SUBJECT: University Hills/Windsor Park Neighborhood Contact Teams

I am writing to discuss certain issues that have been raised by a disagreement between various citizens about the location and characteristics of a proposed pavilion in Dottie Jordan Park. I know you are familiar with the facts, and will revisit them only briefly. I have intentionally included nothing in this memo that could be considered confidential or privileged, so that it can be freely distributed to interested parties.

Background

The Windsor Park/University Hills Neighborhood Plan lists the *construction of a rain/shade pavilion that can accommodate approximately 100 people in the west side of the park [Dottie Jordan Park] near the playground*. The Neighborhood Plan was adopted by the City Council in August 2007.

Based upon an application from a group called The Friends of Dottie Jordan Park, the Austin Parks Foundation, not the City of Austin, is providing the funds to construct that pavilion. The project is currently in the permitting process, and construction is scheduled to begin in June.

A group of neighbors opposing the construction of the pavilion submitted a petition with approximately 250 signatures to the Parks and Recreation Department, in opposition to the construction of the pavilion as planned. In examining various communications between the parties to the disagreement that has arisen, it is fair to say that in addition to this opposition, there is also some expressed dissatisfaction with the neighborhood contact team.

Neighbors who are upset with construction of the pavilion, and the actions of the contact team, have complained that the contact team schedules meetings to avoid input, discriminates against the participation of working people and families, advertises poorly, arbitrarily changes meeting times and dates, and does not have written policies describing the contact team's interactions or relationship with the City.

As you know, certain language in a communication related to this disagreement has created some concern among the members of the contact team that is involved. The language indicated that some neighbors were wondering if they "should take some legal action."

The members of the contact team have asked if they would be represented by the City Attorney if they are made parties to that "legal action."

Analysis

The starting point is to look at the City Charter, which creates the office of City Attorney. The relevant language in the Charter says that the City Attorney "shall be the legal advisor of, and attorney for, all of the officers and departments of the city, and he shall represent the city in all litigation and legal proceedings."

On its face, this language is very narrow. Because my authority is limited by what is specified in the Charter, I must be very careful in determining just who the Charter allows me to represent. Since the City is a municipal corporation and a political subdivision, one of the factors to consider is whether a contact team can be said to be a "part" of that corporation and political subdivision. It is my opinion that the proper interpretation of this Charter language means that representation by the City Attorney must necessarily be limited to entities or individuals that are an integral part of the City structure.

And, even if an integral part of the City structure, I could represent neighborhood plan contact team members only in the case of acts taken in the course and scope of their official duties as specifically defined under City Code. I could not represent contact teams or their members in the case of any action that goes beyond what is set out in City Code.

As to the first question, whether a contact team is an integral part of the City structure, there are characteristics of contact teams that suggest they are not a part of that structure. For example: our Code provides that a "neighborhood contact team is a *neighborhood* organization . . . ; the members are neither appointed nor selected by any City official; the City does not control the actions of contact team members; the City plays almost no role in managing the affairs of a contact team; and contact teams receive no funding from the City. [Although our Code provides that a contact team provide notice to interested parties if they propose a plan amendment, with the City bearing the cost, in practice the City provides notice and does not charge the contact team for the cost of providing notice].

Interestingly, after reviewing testimony offered by contact team members before City Council on June 18, 2009, when Council was considering whether to grant contact teams status as interested parties for purposes of appeal, I am not entirely confident that most contact team members would identify themselves as part of the City structure at all. In the end, City Council granted interested party status to contact teams, a fact that may push contact teams further away from being a part of the City structure. Although appeals are allowed by other parties, normally the City does not appeal its own decisions to itself.

On the other hand, the City Code does give contact teams certain rights and privileges with regard to their respective neighborhood plans. For example, contact teams may submit a letter of recommendation to the Land Use Commission on a proposed neighborhood plan amendment (§25-1-805(F)); and they aid with implementation of the components and features of the neighborhood plan (§25-1-801(2)).

And, under §25-1-804(B)(3), a contact team even has the authority to allow other entities or individuals to submit an application to the director to amend a neighborhood plan during months not otherwise allowed for such other entities or individuals.

These circumstances, taken in their entirety, suggest that an argument could at least be made that a contact team is a part of the City structure. The best statement of that argument is that contact teams are created by the City Code, and they are performing neighborhood planning services for the City, at the request of the City, within parameters defined under City Code.

The best statement of the argument against their being part of the City structure is that they are by definition a neighborhood association, that may have been granted special rights and privileges, but they are still self-appointed and not subject to the management or control of the City.

Taking all of the above-stated arguments together, I can envision a set of circumstances under which I would represent an individual member of a contact team. The following questions are examples of factors that I would consider. Was the team member engaged in an activity requested of the member by the City Code? Was the member acting as an integral part of the Planning and Development Department's planning process? Was the member's activity more representative of that of a neighborhood organization member? Did the City have any control of the challenged action of the member? Could the City's interest be detrimentally affected by the outcome of a lawsuit?

As an example, consider the request by an applicant to file a plan amendment in a month other than that provided by the City Code. The Code clearly authorizes the contact team to approve or deny such a request. If a team member does not approve such a request for lawful reasons and is sued, I would represent the team member. The activity is clearly authorized by the City Code and the team member would be acting within the course and scope of a City-authorized responsibility.

However, consider an example from the other end of the spectrum. There is a disagreement between neighbors, some of whom are team members, over movies shown in a park. A team member, acting as part of the team, votes to show a movie to which other neighbors object. The other neighbors threaten a lawsuit. This would seem to me to be the team member acting as part of the team in its neighborhood organization role as opposed to a City regulatory role. Under this set of circumstances, I would not represent the team member.

Of course, there are many scenarios that could fall along the spectrum established by the above examples. I will consider each case that is presented on its own merits. However,

for now I can say that if a team member is performing neighborhood planning services for the City, at the request of the City, and within specific parameters defined under City Code, the team member may be an integral part of the City structure under who I could represent. Of course, I can only represent a team member in the case of acts taken in the course and scope of their official duties as defined under the Code.

With regard to the specific case of the University Hills contact team and Dottie Jordan Park, unfortunately, at this time I cannot conclude that my office would represent the contact team members should the vaguely-referenced "legal action" be instituted. It is premature to speculate on the details of any prospective lawsuit that might be brought, and on what *legal* claims might be asserted. In this particular case, other than the decision to proceed with the construction of the pavilion, which is the City's decision and not the contact team's, the complaints are largely, if not exclusively about the way the contact team handles its meetings. If a lawsuit is filed, I will, of course, base my decision on the particular legal claims made.

I would like to add the following observation. The risk of successful litigation against neighborhood plan contact team members for their work in implementing neighborhood plans is extremely low or even non-existent. Although contact teams play important roles in implementing neighborhood plans, and in making changes to those plans, they do not have final decision making authority. That authority rests with the City Council -- either through amending a neighborhood plan, or making budgeting decisions to implement a plan. Because final responsibility for neighborhood plans rests with the City Council, the Council, not the contact teams, is invested with legal responsibility for those plans.

I hope this has addressed your questions. If any other questions arise or if you need any clarification, do not hesitate to contact me.

cc: Mayor and Council
Marc Ott, City Manager
Sue Edwards, Assistant City Manager