T0: Open Government Commission

FROM: Complainants

DATE: October 18, 2021

RE: Complainants' Position Statement on Complaint Concerning Jean Sweeney Park

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1. INTRODUCTION

On Sept. 7, 2021, City Council convened a closed meeting wherein Council authorized the City Attorney to execute an agreement with the Union Pacific Railroad (UP) that provides for the UP's sale to the city of .55 acres and two maintenance easements of approximately 7,532 sq. ft. and imposes obligations on the city concerning the land adjacent to the Park which UP continues to own. These items will be discussed in detail later in this Position Statement.

City Council's action in a closed meeting authorizing to the City Attorney to execute the aforesaid agreement under the cover of the "pending litigation" exception to the Brown Act and Sunshine Ordinance included commitments and actions that are required by law to be done at an open meeting, and thus was unlawful.

2. BACKGROUND

The factual background of the events leading to the complained of actions are recited in detail in our complaint and will not be repeated here.

3. PENDING LITIGATION EXCEPTION GENERALLY

Government Code Sec. 54956.9 and AMC Sec. 2-91.10 c authorize a closed meeting concerning existing litigation, "when discussion in open session concerning those matters would likely and unavoidably prejudice the position of the city in that litigation."

Note that cities are not required to have a Sunshine Ordinance unless they want to provide for more transparency and openness than the Brown Act requires. As an example, the Brown Act requires the posting of an agenda 72 hours prior to a regular meeting, while our Sunshine Ordinance requires 12 days-notice. We submit that this is another instance where our Sunshine Ordinance requires more transparency than the Brown Act. **Thus, the propriety of the closed meeting action in question must be tested under both laws.**

4. PENDING LITIGATION EXCEPTION UNDER BROWN ACT

Counsel for the city devotes most of their Position Statement to arguing a position to which we do not except. Clearly the Brown Act allows for the discussion of pending litigation in a closed meeting

and, in most cases, allows for the authorization of a settlement in a closed session. However, an exception to that rule is found in *Trancas Property Owners v. City of Malibu (2006) 138 Cal.App.4th 172.* Indeed, Counsel for the City acknowledges this and correctly states the holding of that case that a city may not "decide upon or accept a settlement agreement in closed session that accomplishes or provides for action for which a public hearing is required by law, without such a hearing." (Id. at p. 187.)
https://resources.ca.gov/CNRALegacyFiles/ceqa/cases/2006/Trancas_Property_Owners_Assn._v._City_of_Malibu.pdf

Counsel for the city argues that there is no city or state law that requires the matters covered by this agreement to be acted upon in public. However, the fact is that there is such a law contained in Sec. 3-10 of the Alameda City Charter which states in pertinent parts:
"All acts of the Council… providing for the acquisition, transfer or lease for a period longer than one year, of real property, shall be by ordinance; provided, however, that the acquisition of real property, or any interest therein, may be authorized by resolution when…such acquisition is to be accomplished by condemnation in eminent domain proceedings…"

We assert that in this case an ordinance is required because the acquisition was not accomplished by condemnation in eminent domain proceedings. While such proceedings were filed, they were dismissed, and the property was acquired by voluntary agreement and accomplished by a deed.

In the instant case there was no ordinance or resolution or compliance with any other provisions of the Charter pertaining to the same. Particular note should be taken of Sec. 3-14 of the Charter which provides:

"Before final adoption of an ordinance, its title, a digest thereof, a notice showing the date, time and place of hearing on its final adoption, and notice that three full copies thereof are available for use and examination by the public in the office of the City Clerk, shall be published once in the Official Newspaper of the City at least three days before said hearing date. Notice of the adoption of an emergency ordinance, its title, and a digest thereof shall be similarly published once within three days after its adoption."

In the instant case there was no ordinance, no advertisement, and no hearing! Therefore, Council's authorization to the City Attorney to execute this settlement agreement was in gross violation of the City Charter's mandate that this be done by ordinance in an open meeting and falls squarely within the Trancas rule that does not allow a pending litigation based closed meeting to accomplish in private what the Charter requires to be done in an open meeting.

5. PENDING LITIGATION EXCEPTION UNDER SUNSHINE ORDINANCE

The Sunshine Ordinance at AMC Sec. 2-90.2 (d) states:

"*The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to a democracy, and with very few exceptions, which this*

article will clarify, that right supersedes any other policy interest government officials may use to prevent public access to information. ***In those rare and unusual circumstances where the business of government may be conducted behind closed doors, those circumstances must be carefully and narrowly defined to prevent any abuse***."

This language is not found in the Brown Act and thus is an instance where the Ordinance requires more transparency than the Brown Act. It may have been drawn from the Attorney General's manual on the Brown Act published several years prior to the Ordinance. It states that the purpose of the pending litigation exception, "*is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions."* (Cal. Atty. Gen. Office, The Brown Act (2003), p.40)
https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/brownAct2003.pdf

Based on the above we now turn to the question of whether the Settlement Agreement is limited to the settlement of litigation or whether significant parts of it represent closed door non-litigation policy decisions.

Certainly, the city's dismissal of the eminent domain proceeding and purchase of .55 acres of UP land plus an additional small 7532 sq. ft. maintenance easement for $1,192,000 is directly related to the original litigation. However, many of the terms of the agreement have nothing to deal with the land purchased by the city and everything to do with promoting the residential development of 3.97 acres of adjacent land with the UP continues to own.[1] Specifically the city agrees to meet the following obligations.

1. Diligently assist the UP in acquiring extensions St. Charles and Chapin Streets from the Alameda Housing Authority
2. Diligent and timely processing of any proposed residential re-zoning of adjacent UP land[2]
3. Diligent and timely processing of any development application submitted by UP for said land
4. In the event of any down-zoning of the UP land to a lower density or the imposition of any fees or development conditions that are specific to the UP land the city will pay to the UP the diminution of value caused thereby as determined by an appraiser.
5. Maintain the said adjacent land for a period of 24 months or until transfers the land to a buyer
6. Give assurances that the city planning staff has expressed support for the rezoning, that it would be consistent with the General Plan and that its development for housing will be beneficial to the city

[1] Paragraph 1 of our Complaint indicates that the original intent of the city was to purchase all 4.52 acres. The city has purchased only .55 acres. Thus, approximately 3.97 acres remains, subject only to a small maintenance easement and is the area we designate as UP adjacent land.

[2] Paragraph 3 of our complaint indicates that in 2018 the city determined to acquire only 2.8 acres of the 4.52 because the acreage deleted was already zoned residential and thus too pricy for the city to purchase. Since the city is only purchasing .55 acres, we conclude that 2.25 acres of the remaining 3.97 acre plot is not currently zoned residential.

It should be evident to anybody other than the most naïve that the above is not the culmination of the original eminent domain litigation, but a clear determination of city housing and Jean Sweeney Park expansion policies with the need for housing trumping park expansion. It is, in fact, a sort of pre-development agreement greasing the track for the building of housing on UP land. AMC Sec. 30-93.1 contains five required elements for a development agreement. This agreement covers three of them, a. the duration of the agreement; b. the permitted uses of the property; and c. density or intensity of use. AMC Secs. 30-93. 2. & .3 require Council approval by passage of an ordinance at a public meeting.

We are not arguing that the settlement agreement is a formal development agreement, but it is certainly a pre-development agreement which logic and common sense requires to be approved at a public meeting.

There was no reason whatsoever why the above six elements of the agreement listed above should not have been placed before Council at an open meeting. The failure to do so prevented the open and informed public discussion that both the Brown Act and Sunshine Ordinance were written to assure.

The facts above clearly support a finding by the Commission that authorizing the execution of this agreement in a closed meeting is exactly what AMC Sec. 2-90.2 (d) of the Sunshine Ordinance and the Attorney General's Brown Act manual forbids.

6. THE REMEDY

We trust that the Commission will find our arguments persuasive and will find that the Sept. 7, 2021 closed meeting action authorizing the City Attorney to execute the settlement agreement violated either or both the Brown Act and the Sunshine Ordinance.

The remedy would be to recommend to Council that it direct that an item be placed on an open meeting agenda proposing an ordinance complying with the requirements of the Charter that authorizes the execution of the agreement.

The acceptance of this remedy may not change the outcome. However, it will subject this agreement to public exposure and comment, and, more importantly, uphold the intent and purposes of both the Brown Act and Sunshine Ordinance.

Respectfully

Dorothy Freeman
Secretary/Treasurer
Jean Sweeney Open Space Park Fund