

Lompoc City Council Agenda Item



City Council Meeting Date: December 1, 2015

TO: Honorable Mayor and Council Members

FROM: Joseph W. Pannone, City Attorney
jpannone@awattorneys.com

SUBJECT: Authorization of Response to Alleged Violation of the Ralph M. Brown Act (the "Brown Act") Regarding the Notice of Determination Issued to California Space Center, LLC ("CSC") Pursuant to the Exclusive Negotiation Agreement Between the City and CSC

Recommendation:

The City Attorney recommends the City Council:

- 1) Authorize the Mayor to sign the letter to Janet Behr prepared by the City Attorney and included with this staff report, as Attachment No. 1, or, alternatively,
- 2) Authorize the Mayor to sign one of the other letters to Ms. Behr prepared by the City Attorney and included with this staff report, as Attachment No. 2 or 3, and
- 3) Direct staff to mail whichever letter is signed, or
- 4) Provide other direction.

Background:

On September 15, 2015, although not required to do so under the Brown Act, the City Attorney reported out from closed session the City Council had directed its real property negotiator to transmit a Notice of Default (the "NOD") to CSC regarding certain milestones required by the Exclusive Negotiation Agreement between the City and CSC (*the "ENA"). That closed session was convened pursuant to an exception to open meeting requirements, as stated in the Brown Act, under the agenda title:

CONFERENCE WITH REAL PROPERTY NEGOTIATORS: Property: approximately 82 acres including and adjacent to Ken Adam Park. City Negotiators: Teresa Gallavan, Economic Development Director/Assistant City Administrator and Joseph W. Pannone, City Attorney. Negotiating Party: Eva Blaisdell. Under Negotiation: Price and terms of payment.

The reasons for the default notice were CSC's failure to provide all the information required by the ENA. That missing information is to fulfill two fundamental terms of the ENA, which are both necessary for the Council to determine the price and terms of payment and conveyance to CSC of 82 acres of prime real estate owned by the City.

On October 13, 2015, the City received a letter from Ms. Janet Behr addressed to Mayor Lingl (i) alleging the Council had violated the Brown Act by providing the above-mentioned direction in above-mentioned closed session, and (ii) threatening litigation based on that allegation. (A copy of that letter is attached as Attachment No. 4.)

On November 3, 2015, the City Attorney met with the Council in closed session to discuss that threatened litigation, pursuant to another exception for open meetings, as stated in the Brown Act. The title for that agenda item was:

CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION:
Significant exposure to litigation pursuant to paragraph (2) of subdivision (d) of Section 54956.9: One Matter regarding alleged Brown Act Violation regarding Notice of Default to California Space Center, LLC.

The day after that closed session, the City Attorney transmitted a letter to Ms. Behr indicating the City was not admitting any violation of the Brown Act had occurred, but to avoid litigation expenses, the Council unconditionally committed it would cease, desist from, and not repeat the challenged past action, as described above. (A copy of that letter is attached as Attachment No. 5.)

On November 10, 2015, the City received another letter from Ms. Behr indicating Attachment No. 5 does not meet the requirements of Section 54960.2 of the Brown Act and, therefore, she once again threatened to take legal action. (A copy of that letter is attached as Attachment No. 6.)

After receipt of that Attachment No. 6, the City Attorney advised Ms. Behr she was correct and also advised his letter did not mention Section 54960.2 and was sent to expeditiously meet her concerns and avoid the expense of litigation by making a public statement committing the City not to violate the Brown Act, as had been alleged. He also let her know since she had again threatened litigation, he would have an item placed on an upcoming agenda for the City to take benefit of Section 54960.2.

We recognize, since the ENA has been terminated, this substance of this matter may seem moot. However, since the Brown Act governs procedural matters, the City Attorney believes the Council should still address this matter.

Discussion:

From the statements in her letter, the City Attorney and Ms. Behr disagree on what can be considered in closed session under the real property negotiation exception.

Ms. Behr seems to believe the Council is only allowed to discuss the actual amount to be paid for City property and how that payment will be made. It would be counter-productive if the Council had to discuss, in public, negotiation points that would likely impact the price someone would pay for City property or the method of that payment, even if those discussions did not involve the actual dollar amount to be paid or how that amount would be paid.

The Council can attempt to avoid the currently threatened litigation, pursuant to Section 54960.2. That Section provides the Council the option of reviewing, in public, a letter that would be sent to Ms. Behr committing the City not to violate the Brown Act, in the future, by not taking the action alleged by Ms. Behr to have been done in closed session. Based on Ms. Behr's letters, the action in question was direction to the City's negotiator to transmit a Notice of Default to CSC. In addition, as evidenced by matters reported out of closed session, that is the only action the Council has taken to date, in closed session, regarding the negotiation of real property with CSC.

That being said, in Attachment No. 6, Ms. Behr has indicated she wants the Council to commit to more than not repeating the above action regarding the NOD. That letter states she wants the Council to commit to stop:

“(i) using closed sessions to discuss the California Space Center Project or the ENA, except in very narrow and specific instances when the [C]ouncil's purpose is “to grant authority to its negotiator regarding the price and terms of payment” (as is allowed by law).

“(ii) using closed sessions to discuss and approve actions related to alleged Brown Act violations.”

If the Council makes the commitment set forth in (i), above, then the City Attorney believes it is likely there may be other times the Council may be challenged if it holds a closed session regarding CSC. Of course, now that the ENA with CSC is terminated, those discussions may not occur. However, since CSC is not precluded from continuing to pursue the Space Center project, there may be a time in the future when the Council is once again asked to negotiate conveyance of its 82 acres.

The City Attorney also believes matter (ii), above, goes beyond what the law requires. If someone alleges a Brown Act violation has occurred and threatens litigation, then the City Council is authorized by the Brown Act to discuss and approve actions in closed session, with an obligation to state in public only reportable actions that may be taken. Not every action the Council may take in a closed session is reportable.

Based on the foregoing, the City Attorney recommends the Council authorize use of Attachment No. 1 in response to Ms. Behr to take benefit of Section 54960.2. That Section only requires the Council to commit not to take actions alleged to have violated the Brown Act. The only action Ms. Behr alleged has violated the Brown Act was directing the City's real property negotiator to issue a Notice of Default. In her letter attached as Attachment No. 6, she believes the City Attorney's letter attached as Attachment No. 5 is evidence the City Council violated the Brown Act. However, all the letter shows is the Council was not endeavoring to take all the benefit provided by the Brown Act (Section 54960.2) to avoid litigation.

However, if the Council believes it would be helpful to bring this matter to a close, then it could consider authorizing Attachment No. 2 be sent to Ms. Behr. With that approach, the Council will clearly establish clear, self-imposed limits on what it will consider in closed session regarding CSC. However, that may be at cross-purposes with CSC's desires and needs. There had been times CSC has requested to meet in private with Council Members to discuss certain aspects of the CSC proposed project and possible participants. To date, the Council has appropriately declined such requests. If Attachment No. 2 is selected, then even if there may be an opportunity for the Council legally to meet in closed session regarding the CSC project in the future, then it will have committed not to do so. That commitment would include not having any real property negotiations in closed session. However, due to the public interest in this project, that may be something the Council wants to consider. Although not preferred, the City Attorney does not have a legal objection to the Council authorizing the Mayor to sign Attachment No. 2.

The third option for Council's consideration is to approve Attachment No. 3, which uses the language suggested by Ms. Behr. However, based on past input from Ms. Behr, the City Attorney believes that too would likely lead to litigation, since she and the City Attorney disagree on what may be discussed in closed session, pursuant to the real property negotiations exception. In addition, the Council is not required by the Brown Act to take actions in public regarding alleged violations of the Brown Act. Instead, the Brown Act provides a public process for the Council to follow if the Council decides it is in the best interest of the City to avoid litigation based on such allegations. Based on the foregoing, the City Attorney does not recommend authorizing the Mayor to sign Attachment No. 3.

Fiscal Impact:

If the Council decides not to authorize the Mayor to sign any of the proposed letters to Ms. Behr or Ms. Behr is not satisfied with whichever letter the City Council authorizes the Mayor to sign, then she may file an action in court alleging the City violated the Brown Act. The City Attorney estimates it could cost the City \$10,000 to \$15,000 to defend that litigation in the trial court. If Ms. Behr is successful in that possible litigation,

then the City may be required to pay her attorney's fees. It is also possible Ms. Behr's attorney's fees could be two or three times the amount charged by the City Attorney. If the matter is taken to the Court of Appeal, then those above amounts could double.

Conclusion:

The City Attorney recommends, after the Council considers the foregoing, all the Attachments to this memo and any comments or other information received during the public discussion of this matter, the Council authorize the Mayor to sign Attachment No. 1.

Respectfully submitted,

Joseph W. Pannone, City Attorney

- Attachments:
- 1) [Recommended proposed letter from the Mayor to Ms. Janet Behr](#)
 - 2) [First alternative proposed letter from the Mayor to Ms. Janet Behr](#)
 - 3) [Second alternative proposed letter from the Mayor to Ms. Janet Behr](#)
 - 4) [Letter from Ms. Janet Behr, dated October 6, 2015](#)
 - 5) [Letter from the City Attorney to Ms. Janet Behr, dated November 4, 2015](#)
 - 6) [Letter from Ms. Janet Behr, dated November 10, 2015](#)