MEMORANDUM OF LAW

DATE: April 6, 1992

TO: Committee on Transportation, Planning and Environment
FROM: City Attorney
SUBJECT: Closed Session Discussions Regarding Threatened Litigation

This responds to a committee referral concerning closed session discussions of threatened litigation. This question arose during committee discussion on a proposal redefining "floodways." A letter was presented on behalf of a property owner which objected to the redefinition and intimated that litigation could occur if the definition was changed as suggested by City Manager Report No. 91-400. A councilmember asked whether the letter could be addressed in closed session as a consideration in determining whether (or how) to amend the Municipal Code regarding floodways. A copy of that letter is attached for reference.

The letter focuses concern about some unspecified properties in the Otay River Valley owned by MKEG Properties. It is unclear exactly where MKEG's properties are situated or how they would be impacted by the changes. The proposed changes would, among other things, redefine the floodway in relation to a 0.0-foot rise in the floodwater profile in the Otay River Valley west of Beyer Avenue, and by a 1.0-foot rise elsewhere. Separate rezoning action would be necessary to implement the definitional changes in relation to any specific property. However, the proposed changes could also impose some general restrictions on development under the Resource Protection Ordinance, San Diego Municipal Code section 101.0462.

The letter argued on MKEG's behalf that the floodway and floodplain fringe would become coterminous, which would thereby deprive the property owner of any economically viable use of its affected properties. The assumption is that properties west of Beyer Avenue and presently characterized as "floodplain fringe" (SDMC section 101.0403) which allows development pursuant to the conditions of the underlying zone, would instead be classified as "floodway" where development would be virtually prohibited. The letter further argues that if the redefinition process or related rezonings are accomplished without certain procedural steps first being observed, the end result will be a "compensable taking." Thus, the letter arguably raises a spectre of inverse condemnation litigation.

In our view then, there is enough of a threat of litigation to allow for an analysis of whether - or how - exceptions to the Brown Act (Government Code section 54950 et seq.) could apply to closed session

discussion by the City Council of this letter.

The Brown Act generally provides that all discussions and actions on legislative matters by public agencies shall be conducted during regular sessions open to the public. Government Code sections 54953 and 54954. A narrow exception, however, allows closed session discussions pertaining to "pending litigation." See Section 54956.9. A copy of that section is attached.

To come within the "pending" litigation exception to the Brown Act, either litigation must have actually commenced, or a significant exposure to litigation be faced by a public agency if certain matters are discussed in open session. Agencies are also authorized to meet in closed session to first consider whether a "significant exposure to litigation" exists based on specific facts and circumstances. Government Code section 54956.9(b) (1) and (2). See also, 71 Ops. Atty.Gen. 96, 105 (1988); "Open Meeting Laws," pages 40-41, Cal.Atty.Gen. (1989). However, the exception is not intended to allow public agencies to reach non-litigation oriented policy decisions in closed sessions. Ibid.

We believe that general consideration of whether or how to adopt legislation would fit in the category of a nonlitigation oriented policy discussion, and therefore should not be discussed in closed session.

On the other hand, the referenced letter's implications regarding potential liability related to specific properties could be discussed in closed session to first determine whether that threat falls within either of the exceptions of Section 54956.9(b) (1) or (2), even though no basis for a lawsuit exists until an ordinance is adopted. Otherwise, if the definition of "floodway" is amended so as to impermissibly rezone this property, or the property is actually rezoned as a consequence of such redefinition or rezoning, the City is then placed in a position of defending litigation and the potential liability from a challenge to the amended ordinance's validity as applied. The same is true of other properties that may be affected by adoption of such an ordinance.

However, we will note further that if the ordinance is amended, a law suit may challenge whether the amendment promotes the public health, safety or general welfare, and whether the provisions are reasonably related to achieve those objectives; i.e., protect life and property from flood hazard within the newly defined floodway area without unconstitutionally denying all reasonable use of the applicable property. These are basic considerations that must be addressed as part of the legislative enactment process. Since MKEG continues to assert this concept in relation to its properties, it may be more productive if the City Manager is directed to first confer with MKEG's representatives and review their contentions to determine whether or how those concerns may (or should) be addressed.

Should it then be the Council's decision to consider the litigation implications presented by the letter regarding the application of such

an ordinance to this property, as outlined above, we would advise the Council in open session with respect to any procedural steps and related issues that may arise or be necessary to a discussion in closed session.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:ps:600(x043.2)
Attachments 2
cc City Manager
Alan Sumption
ML-92-29