

DATE ISSUED: December 6, 2002 REPORT NO: 02-295
ATTENTION: Honorable Mayor and City Council Docket of December 10, 2002
SUBJECT: Item S503: In The Matter Of the 1995 Agreement For The Partial Use And Occupancy Of Qualcomm Stadium [Agreement].

SUMMARY

THIS IS PRIMARILY AN INFORMATION ITEM. DIRECTION MAY BE GIVEN ON EITHER SUB-ITEM BY THE CITY COULCIL.

This report from the City Manager and City Attorney addresses the above referenced item on the City Council docket for Tuesday, December 10, 2002.

Sub-item A: Status Report On An Investigation Into The Impact Of The Settlement Of The *Walker v. City of San Diego* Litigation And The Attendance Guarantee Provisions Of The Agreement.

Following the recent home game between the San Diego Chargers [Chargers] and the San Francisco 49ers on November 17, 2002, the City received an invoice from the Chargers pursuant to the Attendance Guarantee provisions of the Agreement between the City and Chargers. While the game had been reported as a "sell-out," the invoice reflected a sum due for 666 seats under the Attendance Guarantee. The Chargers characterized the invoiced seats as being non-existent due to modifications to the Stadium seating configuration required by the settlement of the case *Walker v. City of San Diego* [Settlement], but for which the team was entitled to compensation under the terms of the Attendance Guarantee. The press referred to the invoice as being for "phantom seats."

Based upon a hand count of seats at the Stadium, conducted prior to the current season, staff reported on November 21, 2002, that there were 61,049 general admission seats at the Stadium and that there were no "phantom seats" (see Attachment 1 hereto). Staff also immediately began an investigation into the impact of the Settlement on the Attendance Guarantee and the validity of the invoice.

To properly assess the circumstances regarding this issue, the City must audit the Chargers' records for the current season, as permitted under express provisions of the Agreement. Normally an audit occurs after the season has concluded, but staff has requested immediate access to ticket sales and distribution records to assess the accuracy of the invoices received to date from the Chargers. Staff is awaiting the Chargers' permission to review the requested records, and as such we are not yet in a position to report any findings or conclusions on the matter. We anticipate being able to report to the City Council in January or February. Below, however, is a brief summary of the Settlement and the City's indemnification obligations under the Agreement, which all relate to the issue of the invoice.

The Agreement provided for the expansion of the Stadium to include "approximately" 71,400 total seats. The Agreement also clearly and specifically required the City to comply with the Americans with Disabilities Act [ADA] in the expansion project, and obligated the City to indemnify the Chargers for losses the team suffered as a result of any act or omission by the City.

The expansion project produced a total of approximately 71,300 seats at the Stadium, meeting the City's contractual obligation. Following completion of the project, the *Walker* litigation was filed. The City and the Chargers were named as defendants, along with the San Diego Padres and Ace Parking. The lawsuit contended that the City failed to comply with the ADA in a number of respects but in pertinent part by failing to put in the required number of disabled seats. The City had installed new disabled seats in the expanded portion of the Stadium, and added a few disabled seats in the older and unmodified general admission area, but did not install disabled seats in the new Club level.¹ The lawsuit contended that the City was required to bring the entire Stadium seating area into compliance with the ADA.

After several years the parties agreed to the Settlement which required certain modifications to the Stadium, including the seating configuration. The Settlement was approved by the City Council in November of 2000, and became effective in early 2001. A copy of the Settlement is enclosed as Attachment 2. Prior to the approval of the Settlement the Chargers required that the City acknowledge its indemnification obligations to the team with respect to the litigation. The City Council authorized the execution of such an acknowledgement in February of 2000, and a written agreement [Indemnification] was executed in March of 2000. A copy of the Indemnification is enclosed as Attachment 3. The Indemnification obligated the City to indemnify the Chargers for the team's losses as a result of any settlement of the litigation, but required the City and the Chargers to negotiate regarding such losses. If the parties could not reach an agreement regarding the losses, the matter would be submitted to binding arbitration.

A few attempts were made at negotiation in 2000 and 2001, but the negotiations could

¹ In its previous configuration the Stadium did not comply with the ADA as it was constructed and previously expanded prior to the passage of the ADA.

not proceed primarily because the required modifications had not yet been made to the Stadium and thus the losses were difficult to assess properly. The matter was thus not yet appropriate for arbitration either. The last discussions regarding the matter were in the spring of 2002. The City and the Chargers had intended on recommencing negotiations regarding the Indemnification, but had not yet done so as of the date of the 49ers game.²

The seating modifications were made just prior to the Chargers' 2002 regular season, and thus this season is the first in which the City and the Chargers have been operating under the provisions of the Attendance Guarantee with the new seating configuration. The modifications resulted in a net loss of seats at the Stadium, approximately 670, resulting in a new total (according to the City's hand count) of 70,555. The net loss was the result of the removal of approximately 1840 non-disabled seats and the installation of approximately 1170 new disabled and companion seats. The Chargers contend that the net loss of seats as a result of the City's non-compliance with the ADA could be a compensable loss to the team under the Agreement. That matter, however, is to be first the subject of negotiation and then possibly arbitration.

As previously discussed, staff will assess the Chargers' records for the current season as well as the impact of the seat modifications required by the Settlement and report back to the City Council with findings and conclusions in early January of 2003.

Sub-item B: Report Regarding The Triggering Event Provisions Of The Agreement, And Other Issues Raised By The Chargers.

By memorandum dated December 2, 2002, the Mayor and Council members Peters and Inzunza requested the City Manager and City Attorney to inquire of the Chargers regarding the potential for delaying the Triggering Event provisions of the Agreement³ and to report back to the City Council on December 10 regarding the inquiry. A subsequent memorandum, dated December 3, 2002, requested a report back on any other issues the Chargers wished to raise with the City. Copies of those memoranda are enclosed as Attachments 4 and 5, respectively. Also on December 3, the Chargers delivered a letter to the Mayor and City Council requesting discussions concerning a broader range of issues under the Agreement, including the Attendance Guarantee and the Renegotiation provisions. A copy of that letter is enclosed as Attachment 6.

Staff has been in contact with the Chargers as requested, and will report to the City Council on the issues set forth in the memoranda.

²Minor modifications continue to be made at the Stadium pursuant to the Settlement, and a full assessment of any losses might still not yet be made.

³In sum, the Triggering Event provisions provide that the Chargers could send the City a renegotiation notice any time between December 1, 2002, and January 29, 2003. The sending of the notice (which is subject to verification) starts a process in which the parties must negotiate regarding potential amendments to the Agreement for a period of 90 days and which, if the negotiations are unsuccessful, is followed by an 18 month period during which the team may solicit offers from other venues.

Respectfully submitted,

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Assistant City Attorney

Note: The attachments are not available in electronic format. A copy is available for review in the Office of the City Clerk.

Attachments:

1. November 21, 2002 Memo to Mayor and City Council
2. November 2000 ADA Settlement Agreement
3. March 24, 2000 Letter Agreement
4. December 2, 2002 Memo to City Manager & City Attorney
5. December 3, 2002 Memo to City Manager & City Attorney
6. December 3, 2002 Letter from San Diego Chargers to Mayor and City Council