

COUNCIL MEETING CONTROVERSY DID CLOSED S.J. SESSION LAST YEAR ON SUBSIDY VIOLATE LAW? OPEN-GOVERNMENT ADVOCATES, CITY ATTORNEY DISAGREE

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Source: BY BARRY *WITT*, Mercury News

Last Nov. 29, the San Jose City Council met behind closed doors, citing a California law that allows private discussions of real estate deals. But newly released records show the talks amounted to a wide-ranging discussion of a controversial subject -- giving a large public subsidy to a professional sports team.

Facing the threatened exit of the Earthquakes *soccer* team, council members considered whether to raid park funds to build a *soccer stadium*. They talked about who would mount a political campaign in support of their plan. They discussed how to market the *soccer* team and even whether to contribute city funds to keep it afloat. Then they voted 10-1 to continue pursuing a generous subsidy deal -- a vote they also kept secret, even when asked about it in the weeks that followed.

It was a discussion that violated the Brown Act, the state's open government law, according to public-access experts contacted by the Mercury News. The city attorney argues that because any point related to economic value is OK to talk about, the discussion complied with the law.

As a council-appointed task force prepares to launch a review of San Jose's open government practices, the Nov. 29 minutes offer an unusual public window into the council's activities behind closed doors.

While it's impossible to know what members talk about in their private meetings every week, the *soccer* meeting has similarities to prior private sessions last year -- sessions in which the council decided what properties to pursue for a potential baseball *stadium*. Although it had never discussed publicly whether the city ought to spend public money on baseball, or where a *stadium* should be located, the council first attempted to acquire the former Del Monte cannery on Auzerais Avenue. Later, the city began buying properties near the Diridon train station, close to the area talked about for *soccer*.

Subsidy for Sharks

At issue on Nov. 29 was a subsidy request by owners of the San Jose Sharks, who were seeking to acquire the Earthquakes and build a new *soccer stadium*. The council's private

vote authorized city officials to continue negotiating with the Sharks on a deal in which the city was offering \$14 million in operating subsidies, a contribution to construction of a *stadium* and free land. Councilman Dave Cortese was opposed.

The posted agenda for the meeting indicated only that the council was going to discuss the city's fire training site on the southwest corner of Park Avenue and Montgomery Street. As it turned out, the discussion also included several private properties north of Park that were not included in the notice.

The deal never came to a public vote after the Sharks rejected the terms and the Earthquakes left for Houston. City council members backed away from the terms later, after city administrators publicly offered a similar deal to the league to attract an expansion team. The total cost to the city would have been about \$80 million.

In an effort to uncover just what the council did that day and how far it was willing to go to keep the *soccer* team in town, the Mercury News last month asked the city to release details of the private meeting.

City Attorney Rick Doyle first took the request to the council in another closed meeting May 16. He justified the secrecy by saying the city faced "significant exposure to litigation" -- apparently meaning he believed the Mercury News might sue over the issue. Doyle then told the newspaper May 18 that he could not release any information from the November meeting.

The newspaper appealed to the council in an open forum, and last week the council voted 6-4 to release the minutes.

The minutes show that, among other matters, city administrators discussed the Sharks' request for the city to subsidize the Earthquakes operations for up to four years while a new *stadium* was being built; Councilman Chuck Reed discussed whether the Sharks would cover the cost of running a campaign seeking voter approval of the deal; Cortese said he could not support the administration's proposal to use funds from a community parks bond fund known as Measure P for the *stadium*; Councilman Ken Yeager expressed "worries about the impact this would have on a possible baseball *stadium* -- politically and economically"; and Councilman Forrest Williams asked about poor fan support for the team.

Expert sees problem

Discussion of all those issues, and a number of others, should have been done in the open, said Terry Francke, general counsel for Californians Aware, an open-government advocacy group in Sacramento.

"Everything that I can see in these minutes goes beyond the scope of a proper closed session for that property," Francke said.

Francke said the council's discussion was similar to the actions of the San Diego City Council when it met in secret about a new baseball park for the Padres. An appellate court in 2002 upheld a trial court's finding that the San Diego Council broke the open-meetings law when it discussed in secret "financing of the ballpark project" and related matters.

Doyle, San Jose's attorney, said the facts in the San Diego case were much different than in San Jose and that the San Jose council's discussion was permitted under the law.

The question before the council was "what's the financial package you're willing to put on the table," Doyle said. That includes discussing where the money might come from, such as using the community parks fund, he said.

The minutes are not a complete version of everything that was said. But they show that in the end, on a motion by Vice Mayor Cindy Chavez, the council decided to "move forward with negotiations per staff recommendation but with 'Reed' package." Reed, who is running for mayor against Chavez, said in an interview he wanted to ensure the city would get a percentage interest in the *stadium* and dates for community use proportionate to the size of its entire financial commitment to the deal.

Reed has been a proponent of open-government reforms, but he said this particular closed-door discussion was appropriate because every subject affected the value of the transaction. Cortese said he disagreed and believes the council went too far behind closed doors.

Chavez was unavailable for comment Friday and over the weekend. Earlier this year, she said in an interview that she did not know if she would have approved the terms of the *soccer* deal that was revealed in December.

In addition, her calendar shows she spoke several times in the weeks before the council discussion with the president of the Sharks and leaders of the *Soccer* Silicon Valley booster group.

One of those members, Don Gagliardi, a neighborhood activist who is close to Chavez, wrote to *soccer* fans on an electronic bulletin board in March that Chavez "alone among any of our elected officials, negotiated the generous deal that" the Sharks "rejected at the eleventh hour." However, Gagliardi continued, Chavez was "understandably hesitant to make *soccer* a centerpiece of her campaign" because the proposal had been "savaged" in the press.

"Cindy is a big supporter of *soccer* in San Jose and encouraged all sides to continue the discussions to keep a major-league *soccer* team in San Jose," Adam Byrnes, a Chavez aide, said Friday.

WHY IT MATTERS

Explaining the Brown Act

The Brown Act requires city councils, public commissions and boards to discuss and transact their business in a public setting, including time for comment by the public. Exceptions for closed-door meetings include: employee performance, public security, pending litigation, labor negotiations, and discussions of price and payment terms regarding property transactions.

The meeting in question

On Nov. 29 the San Jose City Council met in closed session to consider "price and terms of payment" for land for a *soccer stadium*. But the discussion also included possible campaign ideas for the stadium, marketing and fan support issues.

The question is whether those and other topics discussed in the closed-door meeting violated the Brown Act.

Source: California Attorney General's Office, San Jose City Council closed session notes, Mercury News reporting