

**ATTORNEY TO CLIENT
CORRESPONDENCE****FOR CONFIDENTIAL USE ONLY**

**Office of
The City Attorney
City of San Diego**

MEMORANDUM**236-6220**

DATE: November 18, 2002
TO: Council Member Donna Frye
FROM: Leslie J. Girard, Assistant City Attorney
SUBJECT: Item No. 7, Closed Session Agenda for November 19, 2002

Your letter of November 18, 2002, to the City Attorney regarding the above referenced matter (copy enclosed) has been referred to me for a response. Although not specifically identified in your letter, I believe that you are referring to the item noticed under Government Code section 54956.9(b)(1), significant exposure to litigation.

This matter relates to the City's liability should the City Council not undertake to review and approve a cost of service study regarding wastewater fees. Our purpose is to describe to the City Council why the City faces liability should the City Council not proceed with the cost of service study. In our opinion, the closed session discussion is permitted pursuant to Government Code section 54956.9(b)(3)(a) which provides that the City Council may meet in closed session because there are existing "facts and circumstances that might result in litigation against the [City] but which the [City] believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed."

As the memorandum on this matter makes clear, a decision is not being made in closed session regarding the proposed study, we are merely advising on the litigation risk in the event a appropriate study is not brought forward for action. Any action regarding the proposed study will be taken in open session, if at all.

Regarding past discussions of this matter in closed session, the City's liability regarding sewer rates and the application of Proposition 218 was properly noticed under the same Government Code sections initially last December 11. The matter was taken off calendar that day, but noticed again

Council Member Donna Frye
November 18, 2002
Page 2

on January 22, 2002. The matter was again taken off calendar but scheduled again for January 29, 2002, at which time it was considered. A copy of our report on the issue is enclosed.


On that day, no action was taken by the City Council, except that the City Attorney was directed to further analyze the City's exposure and report back to the City Council. As a result of that direction, staff did not bring forward the matter to open session for consideration, and the City Council did not take a vote directing that the study not come forward in open session.

With regard to the proposed study, it is our understanding that it is still in progress and not yet final. In addition, the study will still need to be considered and either adopted or rejected by the City Council. It is therefore exempt from disclosure at this time pursuant to Government Code section 6254(a). Your access, as a Council member, to any documents in progress at this time is not restricted by the Public Records Act, however, and you should contact the City Manager regarding access to any documents that are in progress. We are not in possession of any relevant documents.

In sum, there has been no action by the City Council in closed session regarding this matter, and we do not propose any. We are advising on the liability should the City Council not proceed with a study to ensure that the wastewater fees are proportionate. Any prior discussions of the City's potential liability were within the allowable provisions of the Brown Act, as is the discussion tomorrow. I note that, because of other matters on the agenda for November 19, there may not be sufficient time to address this issue on November 19 and the item may be continued to a future date.

I have not enclosed the actual notices for the prior closed session; they were noticed in an identical manner as the item tomorrow. If you still need copies of the notices, I will be happy to provide them to you.

Please call me if you have any questions.



LJG:ljj:js
enclosures