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August 31, 1983

CC: CITY COUNCIL

Mr. Robert Allen
Interim City Manager
City of East Palo Alto
2415 University Avenue
East Palo Alto, CA 94303

Re: Closed Session Meetings
of City Council (Executive Sessions)

Dear Mr. Allen:

This letter is to provide the city council members and other "legislative" bodies in the city with a legal opinion as to the conditions and circumstances in which they could hold closed session meetings.

The Government Code Section 54954 et seq., popularly known as the Brown Act, is the statute that regulates meetings of the legislative body. The Brown Act requires that all meetings of the "legislative body" of the city be open and the public and all persons be permitted to attend. The phrase "legislative body" under the act not only includes city council meetings but also encompasses meetings of the following bodies of the city: planning commission, library board or commission, recreation commission, rent board and other permanent city boards or commissions, advisory commissions, advisory committees or boards created by the formal action of the city council, or any member of the city council. (See section 54952.3 of the Government Code*.) It also includes any board, commission, committee or other body on which city officers serve in their official capacity as members.

The right of the public to notice and attend meetings, however, is not without exception. (§54953) The city council under certain conditions could hold what is termed as "executive" sessions (or closed sessions). Thus, a closed session may be held during a regular or special meeting.

1. Meetings of a city council with its city attorney for the purpose of general discussion and consideration of litigation pending or threatened (potential litigation),

*All section references herein, unless indicated otherwise, are to Government Code.

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2. Meetings of the city council with the attorney general, district attorney, sheriff or chief of police, or their deputies on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities.
3. To consider the appointment, employment or dismissal of a public employee, or to hear complaints or charges brought against an employee, unless the employee requests a public hearing, and may exclude witnesses. (§54952 and §54957)
 - a. City manager, city attorney or department heads or other similar administrative officers of the city which are considered employees may be appointed in closed session.
 - b. After the council appoints, employs, or dismisses an employee in closed session, the council must report at its next public meeting, any action taken during the closed session. (§54957.1)
 - c. The city council may ask the clerk or other officer or employee to attend a closed session and to keep a record of the topics discussed and decisions made which is required to be kept confidential. This minute is only available to the council members or submitted to court if violation of the Brown Act is alleged.
 - d. The general rule regarding dismissal of an employee is that an employee may request a public hearing rather than an executive (closed) session. The employee has no right to require a closed meeting.
4. Should a member of the Rent Task Force be appointed in closed session? It is my understanding that the Task Force is an ad hoc committee whose primary object will be to recommend to the council relative to possible

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rent control legislation. The position involves merely the interchange of information, the assembling of data and formulation of proposals to be submitted to the council. While the members of the Task Force are entitled to reimbursement for actual and necessary expenses, there is to be no compensation in connection with their service in the Task Force.

The Brown Act is not clear as to how the ad hoc committee should be appointed. Since no public duty in the sense of which an exercise of a part of the governmental functions is delegated to this body, its membership should be appointed at the council's public meeting. Furthermore, since the type of rent control that the city should adopt is a very sensitive issue, an open public appointment is preferred.

It is important to note that in making appointments to the Task Force at a public meeting, secret ballots are not permitted. The Brown Act, as interpreted by the California Attorney General, precludes secret ballots at meetings which are public. (See 59 OPS. Cal. Atty. Gen. 619-1976.)

Enclosed also you will find an outline of the procedure for conducting public hearings relating to land use matters.

Sincerely yours,

STUCKEY & JOHNSON

By Tesfaye W. Tsadik
Tesfaye W. Tsadik

TWT/tm

enc.

CONDUCTING CITY COUNCIL
OR PLANNING COMMISSION PUBLIC HEARINGS
RELATING TO LAND USE MATTERS

When conducting a public hearing the city council or planning commission is functioning as a quasi-judicial body. At these times the city council (planning commission) will listen to the testimony given before it and make a decision on the matter based upon the evidence presented to it. On occasion, the subject of a public hearing may be controversial and the decorum of the meeting must be preserved if the city council (commission) is to receive the information it needs to reach an adequate decision. During such a hearing persons may become excited or tempers rise and it is essential that the city council (commission) preserve the dignity of the proceedings and maintain an impartial attitude. Under no circumstances should a member of the city council enter into argument with members of the audience or with other city council members during any public hearing.

Assuming that an item dealing with land use question (i.e., permit request, variance from zoning ordinance, etc.), is a subject of public hearing, we suggest the following procedure to be followed:

1. At the onset the mayor (chairperson) should summarize the procedure in which the public hearing will be conducted.

- a. Mayor (chairperson) to audience: "Since the burden of proof is upon the applicant to demonstrate that his request should be granted, this council will conduct its hearing using the following format:

First: staff report and recommendation will be heard;

Second: applicant will be given an opportunity to present statements amplifying the written application or providing supplemental information;

Third: anyone else wishing to do so may speak in behalf of the application;

Fourth: anyone wishing to be heard may speak in opposition to the application;

Fifth: applicant will be afforded the opportunity to offer statements in rebuttal to opposition statements;

Sixth: the public portion of the hearing will then be closed and no further testimony will be taken."

b. Mayor (chairperson) then announces: "This is the time and place for the public hearing on the application of _____ for a Use Permit (or other matter) to do _____. Will the clerk indicate that proper notice of this hearing has been given?" Upon indication by the clerk that notice of the hearing has been given as required by law, the chairperson will state "The hearing is now open." In order to obtain a better understanding of the matter before the council, council members should after each individual presentation fee free to ask questions.

- (1) At this point the mayor (chairperson) calls for staff reports upon the application.
- (2) After those reports are given the mayor (chairperson) states "The applicant or his representative may now present evidence on behalf of the application." After this is finished the chairperson will then call for any other person wishing to speak in behalf of the application.
- (3) After all evidence is given in favor of the application the mayor (chairperson) will then state, "We will now hear from those who wish to speak in opposition to the application."
- (4) After all opponents have been heard, the mayor (chairperson) should ask twice "Is there anyone else wishing to be heard in opposition to the application; there being no one else heard in opposition, the applicant or his representative may now speak in rebuttal to the opposition. Kindly confine your statements to the subject of the opposition to the application."
- (5) After the rebuttal is finished the mayor (chairperson) states, "I now declare the public portion of the hearing closed. The council (commission) now has the matter before it for consideration. What is the pleasure of the council (commission)?" After closing the public hearing, neither the applicant or any opponents should be allowed to speak.

During the course of the hearing, any person or commissioner should direct any question regarding the matter to the mayor (chairperson). No direct questioning of witnesses should be allowed.

2. Evidence and burden of proof. In the exceptional instance where a land use regulation is attached in a court proceeding by a property owner or other disappointed party the most frequent basis for the attack and the place where the City is most vulnerable is in the area of whether or not the decision is reached using proper and ascertainable standards and is based upon sufficient evidence so that the decision cannot be termed arbitrary or unreasonable.

The rules and principles by which this is determined are derived from (1) Government Code section 65800 et seq. (2) provisions from the governing ordinance prescribing those matters which must be found before the application may be granted and (3) judicial decisions.

The applicant has the burden of producing the evidence and convincing the council (commission) that the standards and conditions which are a prerequisite for the granting of the request are met.

State legislation delegates to the council (planning commission) the power to make decisions. It is therefore essential that in exercising this delegated power the council (commission) must substantially comply with all statutory requirements. Due process requirements as well as the state law and local ordinance will require the council (commission) to find that certain facts, conditions and circumstances exist before making the decision. These findings must be based upon the evidence presented at the hearing and they form the basis which support the decision.

One basic purpose of findings is to aid a court in determining whether there is sufficient evidence to support them and to enable the court to examine the decision in order to determine whether it is based upon a proper ground. Another purpose is to advise the parties of the reasons for the action taken. This aids them in deciding whether to take further additional proceedings and if so upon what grounds.

3. May impose conditions. In acting upon a request authority exists to limit or condition approval by requiring the dedication of land, the construction

of improvements, site plan approval, architectural standards, access controls, time limits, phasing of improvements, planting or screening.

4. Procedure for making findings. The conduct of a public hearing is not always organized in such a way that relevant facts and circumstances bearing upon a decision are presented in a logical and precise manner. Inexperienced applicants are either unfamiliar with or will overlook proof of important circumstances which have a bearing on the standards which must exist in order to grant the request. This evidence will be developed in the course of city council (commission) deliberations or in the questioning of the applicant or other interested person who may be heard. In most if not all cases there will not be prepared in advance the appropriate action making the necessary findings to support the particular decision to grant, grant with conditions or deny. The practice with respect to this will vary among jurisdictions. Among some of the possibilities are these:

- a. A standardized form of proposed action can be prepared in advance encompassing all of the possible facts and circumstances and including all conceivable findings. By deletion or modification this can be conformed to the case and immediately adopted.
- b. The city council (commission) can verbalize its findings during the deliberative process. This is done by expressing an opinion with supporting reasons for it. A decision is reached by each member expressing his opinion and the particular reasons for his opinion. The important thing is that these findings are verbalized and are related in some way to the evidence and the other facts and circumstances which are developed during the hearing. The city council (commission) can either at this point orally formulate the action by the making of a motion setting forth the various reasons or it can direct the staff to prepare the appropriate written findings for presentation and adoption at the next meeting.

If the city council (commission) minutes are sufficiently detailed with respect to the oral presentations made and the evidence adduced during the hearing, a simple motion or minute order granting or denying the application together with a statement of reasons for the action would be sufficient. These detailed minutes would provide a sufficient basis for a court if the matter should be appealed, to comprehend the reason for the action taken and the existence or nonexistence of facts necessary to support the action taken.

On the other hand, if the minutes are abbreviated and only summarize the action taken but not the evidence presented, then care should be taken in the formulation of the action taken. It would be well to direct the staff to prepare findings for presentation and adoption at the next meeting. These would be proposed or tentative findings which should then be carefully reviewed to make sure that they conform with the facts elicited during the hearing.