

WEDNESDAY, FEBRUARY 26, 2020

PERSPECTIVE

Public agencies must include threats of litigation in agenda packets

By **Steven P. Graham**

The 1st District Court of Appeal held in *Fowler v. City of Lafayette*, 2020 DJDAR 1030 (Feb. 10, 2020), that under the Ralph M. Brown Act, Government Code Sections 54950, et seq., the city of Lafayette should have included the contemporaneous record reflecting a threat of litigation in the city council's agenda packet before holding a closed session. Specifically, the court found that Government Code Section 54956.9, subdivision (e) (5) requires public agencies to make the record of the litigation threat "available for public inspection pursuant to section 54957.5." That section, in turn, requires public agencies to disclose agendas of public meetings and other writings that are distributed to members of a public agency in connection with open meetings. Reading those two sections together led the court to determine that litigation threats must be included in the agenda packet and cannot simply be deemed public records by the public agency.

In this case, property owners sought to develop a "tennis cabana" next to a tennis court on their 2.38-acre residential property. After four public

hearings and several changes to the proposed project, it was approved by the city's design review commission. Several neighbors appealed the decision to the city's planning commission, where additional public hearings were held. After the planning commission approved the tennis cabana, the neighbors appealed the decision to the city council.

The city council held four public hearings on the appeal where various concerns related to the project were raised by the neighbors. On the same day as three of the public hearings, the city council also held a closed session related to the project that was placed on the agenda with the following description:

"Conference with Legal Counsel - Anticipated Litigation Significant Exposure to Litigation (Gov. Code section 54956.9(d)(2).) (1 case)."

The closed sessions were held based on a threat of litigation from David Bowie, the attorney for the property owners. The city created a contemporaneous record of the threat of litigation in the city's planning database, where the notes stated, "[o]n multiple occasions now, on the phone D. Bowie indicated he would take the matter to court if the City denied the project. M.

Canales informed M. Subramanian [the City Attorney] of litigation threat." After the city council approved the tennis cabana, the neighbors brought an action in the trial court claiming, among other things, that the city had improperly held closed sessions under the Brown Act on the project because the city had not included the litigation threat in the agenda packets. The city countered that Government Code Section 54957.5 does not require the city to distribute the litigation threat, but merely to make the record available to the public upon request. The trial court agreed with the city and the neighbors appealed.

The Court of Appeal, in determining whether the litigation threat was required to be a part of the agenda packet for the city council, found that because, "[t]he clear import of section 54957.5 is that agendas and other writings that the legislative body receives in connection with a meeting should be available to the public upon request ... [that] [t]he only reasonable inference is that a record of a litigation threat to be discussed in closed session must be included in the agenda packet made available upon request before a meeting." Reading Sections 54956.9 and 54757.5 together,

the court found that, "a litigation threat [must] be reduced to writing and included in the agenda materials available to the public upon request."

Ultimately, the Court of Appeal found that the numerous public hearings demonstrated that the tennis cabana had been debated exhaustively, and there was no indication that the city's failure to include the litigation threat in the agenda packet prejudiced the neighbors. For that reason, and despite the technical violation of the Brown Act, the decision of the trial court upholding the city council's decision was affirmed. ■

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