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Appellate Court upholds city's 2016 approval of cabana project

By Pippa Fisher

The city announced a victory in the case heard by the Court of Appeals, filed by a small group of Lafayette residents challenging the approval by the city of a neighbor's cabana construction.

The group alleged that the city had used a biased process in reaching the land-use decision in 2016 by improperly considering the application in closed session, in violation of the Brown Act - an open meeting law designed to ensure transparency in local government - and that they were deprived of a fair hearing due to a potential conflict of interest at the design review and planning commission level.

The California First Appellate District Court upheld the trial court's December 2018 ruling against the plaintiffs. The court did however agree that the city violated the Brown Act but concluded there was no prejudice.

"We are very pleased that the Court of Appeal has affirmed the city of Lafayette's trial court victory in this matter," said Lafayette Mayor Mike Anderson in a Feb. 11 statement. "The city will continue to keep our focus on important issues facing Lafayette."

The litigation stems from the application for a now-completed tennis cabana, which went before the planning commission at four meetings between December 2015 and May 2016. Following the planning commission approval the neighbors appealed to the city council, which considered it at four further meetings. While approval was pending, the applicants' attorney threatened to sue the city if denied. The city attorney notified the council of the litigation threat orally during a July 25, 2016, closed session meeting. Record of this litigation threat was not made public, although notes were kept and could be viewed at the planning department if the public knew to ask for them. The court determined, "This availability is illusory if an interested person would not know the question to ask," the court report states.

The plaintiffs were not aware of the threat of litigation until after the project was approved.

The court found that no prejudice resulted from the violation and that it had no impact on the city council's decision. The report reads, "Here, where there is no basis to conclude the closed sessions were themselves improper, where the merits and demerits of the project were exhaustively debated in multiple city council meetings, and where there is no indication of how the plaintiffs would have proceeded differently if they had known of the threat, we see no basis for inferring even the possibility of prejudice from the city's failure to disclose in the meeting packet the applicant's litigation threat."

Attorney for the plaintiffs, Scott Sommer, is concerned for potential implications this could have on cities' future practices. He says that despite the court finding the city violated the Brown Act by holding closed session meetings without the record being available for public inspection, the court rejected finding the project null and void, which he says, sets a new precedent.

"In requiring 'prejudice' - that a petitioner must additionally show the council would have voted differently had the law been complied with - the Court has established a precedent that will make it difficult or impossible for citizens and the media to henceforth use or enforce the Brown Act's 'Sunshine' provisions," says Sommer. "This is a purely judicial creation not found in the specific statutory language or exceptions the Legislature put in the Brown Act, and will be controversial."

Sommer says the group will meet to decide what their next steps might be. Their options include petitioning for a rehearing or taking it to the California Supreme Court.

Legal fees to date have cost Lafayette taxpayers \$832,023.

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