

The cost of keeping secrets

By Marsha Sutton

The escalating tension between the Del Mar Union School District and the city of Del Mar over the disposition of the district's surplus property on Ninth Street known as the Shores shows no signs of abating. On the contrary, the once cordial relationship has sunk to new lows in recent weeks.

Having reached an impasse in negotiations and out of frustration with the process, the city made public many closed-session details, much to the school district's dismay. The DMUSD is countering the city's revelations with a public relations campaign of its own.

The stalemate is over price, naturally. The dispute is causing both agencies to bring out their big guns and have at each other, over what both parties see as one of the last remaining open spaces in the city.

Look for the school district to round up the usual supporters to speak at future school board meetings to endorse the district's position that the Shores should not be sold for a penny less than what the property might be worth to a developer. And look for the often divided residents of Del Mar, a powerful lot, to unite against a common enemy and threaten to withdraw big bucks from the school district's foundation if an amiable agreement cannot be struck.

Worst of all, look for lawsuits to fly if the situation degenerates further.

As most of the people involved in the issue focus on the larger implications of various what-if scenarios, I'm troubled by a minor technicality. But sometimes the biggest matters are affected by trivialities, those pesky little details that often get overlooked, with dire consequences.

That the DMUSD may be jeopardizing the eventual sale of the Shores property by violating the law in one trivial instance should be of interest to all players in this land dance.

My preoccupation is with item #1.2 on the April 25 school board agenda for closed session. It reads: "Conference with Real Property Negotiator (G.C. 54956.8) – Property: 225 9th Street, Del Mar, CA 92014 – Agency Negotiators: Thomas F. Bishop, Superintendent/Rodger Smith, Director of Facilities/Personnel – Negotiating Parties: DMUSD and unidentified public benefit corporation (prospective purchaser, name not disclosed due to concern over prospective negotiations)."

My email sent May 4 to Bishop and school board president Barbara Myers reads in part: After consulting with several attorneys who specialize in public information laws, the Brown Act, and other issues related to governmental agencies' open-meeting requirements, it was determined that the DMUSD is in violation of the Brown Act by not disclosing the name of this unidentified party.

I respectfully ask you to provide me with the name of this undisclosed public benefit corporation, as required by the Brown Act.

If you determine that you are exempted from releasing the name to the public, please cite for me the specific clause in the Brown Act or other legislation that would allow you to withhold this information from the public.

The Ralph M. Brown Act requires public commissions, boards, councils, and the other public agencies in California to take actions and conduct their business openly. Its famous declaration of intent reads as follows:

"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is

good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

There are exceptions to the open-meeting requirements, one of which is real property negotiations. But rules must be followed closely if an agency is to meet legitimately in closed session. It is critical that the process be legal, because any false step can negatively impact future action and result in lawsuits against the exposed agency.

According to Terry Francke – founder and general counsel for Californians Aware, a statewide nonprofit organization that supports and defends open government, the First Amendment, and the people's right to know – public agencies must name the party with whom they are negotiating in closed session, under the requirements of the Brown Act.

Francke, who is well-recognized throughout California for his knowledge of the Brown Act and the Freedom of Information Act, has 26 years of experience in these matters and said he has never seen a public agency attempt to keep a negotiating party's name confidential. It's a clear, unambiguous violation of the law and “is not a gray area,” he said.

To its credit, the DMUSD forwarded my correspondence to its legal counsel – Bowie, Arneson, Wiles & Giannone of Newport Beach – and sent me a copy of the attorneys' memo explaining why they are advising not to release the name of the interested party. The law firm's memo follows in its entirety:

The Ralph M. Brown Act (“Brown Act”) governs the meetings of a legislative body of a local agency. Meetings of the legislative body are required to be open and public with few limited exceptions.

One of the exceptions to the Brown Act is the authorization for discussing real estate negotiations in closed session. Pursuant to the real estate negotiation exception, the legislative body may meet in closed session with its negotiator to discuss the purchase, sale exchange, or lease of real property by or for the local agency. Prior to holding such closed session, the legislative body is required to identify its negotiator, the real property under which the negotiations are being held, and the names of the person with whom its negotiator may negotiate. (California Government Code Section 54956.8)

The Del Mar Union School District (“District”) has been in negotiations with the City of Del Mar (“City”) for the Shores School site for in excess of six months. Periodically, the status of the negotiations has been discussed in closed session with the Board of Trustees.

We understand that a non-profit public benefit corporation is interested in potentially entering into negotiations with the District for the acquisition of a purchase or lease of the Shores School site. In light of the actions taken by the City recently, we are concerned that the release of the name of the public benefit corporation may result in the City or other members of the public attempting to interfere with these negotiations. Our concern is based on the fact that the City contacted the district's tenant, Winston School, and entered into a Memorandum of Understanding addressing how future negotiations should be handled for the Shores School site. This was done notwithstanding the fact that Winston School is a current tenant of the District and is already in a contractual relationship with the District for a lease of a portion of the Shores School site. Aside from the activities of the City and Winston School, the City has also encouraged community members to request that the District release its real estate appraisal and attempt to pressure the District into selling the Shores School site at a price lower than desired by the District.

We are concerned that the City and/or community members may attempt to contact the public benefit corporation or otherwise interject into these negotiations. Accordingly, we have recommended that the negotiating party not be identified at this time. In addition, as no action is intended to be taken with regard to the status of the negotiations, we do not anticipate any action would be taken which would be considered a violation of the Brown Act.

Our decision to recommend that the District not identify the public benefit corporation at this time is consistent with the common purpose of the Brown Act. The authorization for allowing a closed session to occur is to avoid revealing confidential information which may in specified circumstances prejudice the legal or negotiating position of the agency.

Our recommendation with regard to the listing of the closed session identifies the reason for the withholding of the name of the entity and we believe will avoid potentially prejudicing the District's negotiating position.

The attorneys' memo gives reasons, some of them valid, why the DMUSD might not want the name of the public benefit corporation released. But that does not mean the district can withhold the information. There's no evidence in this memo that these reasons provide legal justification for circumventing the requirement to disclose the name. Just because revealing the identity complicates negotiations does not mean the district can break the law.

If these reasons were legally valid, no governmental body would ever release any names, Francke said.

Yet there are other, more overriding reasons to disclose the name than simply to appease an irritated journalist who seethes when public agencies illegally keep secrets.

By violating the requirements of the Brown Act, the DMUSD could see any future agreement over the sale or lease of the Shores property challenged by any party deciding to investigate the process to ensure that everything proceeded legally.

According to Francke, the courts could make any agreement over the Shores null and void, should any party – the city of Del Mar, the District Attorney's office, another interested buyer – discover any illegal action in connection with the disposition of the property.

"Anyone can come in and sue them which would set aside any agreement they might make," Francke said.

In light of the severity of this penalty, publicly identifying the interested party is of small significance when weighed against this larger consequence.

Although DMUSD attorneys contend that not identifying the public benefit corporation "is consistent with the common purpose of the Brown Act," Francke completely disagrees. "What's consistent with the purpose of the Brown Act is not to allow governmental bodies to simply disregard the law because it's financially inconvenient," he responded. "I think they badly need a second opinion."

It is the DMUSD's choice to make an enemy of the city of Del Mar if it so chooses. It is also the DMUSD's decision to violate the Brown Act by holding closed sessions without following the law. But there are consequences to both actions. School board members need to ask themselves if their recent decisions are worth the price.

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