

## ANTIOCH CITY COUNCIL

**Adjourned Regular Meeting  
7:00 P.M.**

**August 17, 2010  
Council Chambers**

### **6:00 P.M. - CLOSED SESSION**

#### **1. CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION –**

Significant exposure to litigation pursuant to subdivision (b) of Government Code Section 54956.9: One potential case.

#### **2. CONFERENCE WITH LABOR NEGOTIATOR – Employee organizations:**

Public EmployeesqUnion Local No. 1, Operating Engineers Local Union No. 3, Antioch Police Officersq Association, Antioch Police Sworn Management Association, Management Group, Confidential Group, Treatment Plant EmployeesqAssociation. This Closed Session is authorized by California Government Code §54957.6.

Mayor Davis called the meeting to order at 7:41 P.M. City Clerk Martin called the roll.

Present: Council Members Kalinowski, Moore, Rocha, Parsons, and Mayor Davis

City Attorney Nerland reported the City Council had been in Closed Session and there was no reportable action. She also reported that the first closed session was due to facts and circumstances regarding the Council's action on the Walmart Expansion application that may lead to significant exposure to litigation.

### **PLEDGE OF ALLEGIANCE**

Mayor Pro Tem Rocha led the Council and audience in the Pledge of Allegiance.

### **ANNOUNCEMENTS OF CIVIC AND COMMUNITY EVENTS**

Walter Ruehlig announced the Knights of Columbus would be sponsoring a Police Officer, Fire Fighter and CHP Officer of the Year on September 18, 2010 at Lone Tree Golf Course. He announced the Contra Costa County Interfaith Peace Project International Day of Peace would be held on September 18-19, 2010 at St. Ignatius Church, in Antioch.

Eren Mendez, Contra Costa County Elections Department, announced for the public, election officials were seeking polling places for two precincts in Antioch for the November 2, 2010 election. Contact information was given.

### **PUBLIC COMMENTS**

Gil Murillo, Antioch resident, expressed concern, should the ballot measure for local sales tax be approved, the funds would be going to the general fund. He requested the City Council recommend the oversight committee direct the funds be directly deposited to the appropriate accounts.

Nancy Fernandez, Antioch resident, requested the City Council treat all correspondence the same, adding the City did not have to defend a councilmember who acts with malfeasance in performing his or her duty.

### **COUNCIL SUBCOMMITTEE REPORTS**

Councilmember Parsons announced she attended the 90+ birthdays at the Senior Center, stating it was a wonderful event.

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## **MAYOR'S COMMENTS**

Chief Hyde updated the community on the condition of Police Canine Thor who was recently wounded in the line of duty.

Councilmember Rocha thanked the Police Department for notifying the City Council of police matters in a timely manner.

Chief Hyde reported the Police Department had received notification by email and letter the Antioch Youth Intervention Network had been named one of the finalists in the programs for the National League of Cities.

Mayor Davis thanked the staff of the Youth Intervention Network for doing such a great job with the youth in the community.

### **1. COUNCIL CONSENT CALENDAR**

- A. APPROVE AWARD OF BID FOR RENOVATION OF PREWETT PARK EASTERN PARKING LOT (MEASURE WW PROJECT) P.W. 567-C**
- B. AUTHORIZATION TO INCREASE THE PURCHASE ORDER #110226 WITH ODYSSEY LANDSCAPE SERVICES FOR LANDSCAPE MAINTENANCE CITYWIDE**
- C. AUTHORIZATION TO INCREASE THE PURCHASE ORDER #110227 WITH ODYSSEY LANDSCAPE SERVICES FOR LANDSCAPE MAINTENANCE CITYWIDE**

On motion by Councilmember Kalinowski, seconded by Councilmember Parsons, the Council unanimously approved the Council Consent Calendar.

## **PUBLIC HEARING**

- 2. APPEAL OF THE FINAL ENVIRONMENTAL IMPACT REPORT CERTIFICATION AND DESIGN REVIEW APPROVAL FOR THE WALMART REMODEL AND EXPANSION PROJECT (AR-04-25) (Continued from July 27, 2010)**

Senior Planner Morris and City Attorney Nerland presented the staff reports dated July 22, 2010 and August 12, 2010 recommending the following possible Actions: A) Decline to certify the EIR as currently drafted and direct staff to consider what the appropriate environmental review for the design review application should be, given the recent appellate case of San Diego Navy Broadway Complex Coalition v. City of San Diego, or B) Deny certification of the EIR and provide alternative direction as to how to proceed with the design review application.

City Attorney Nerland reviewed the protocols for the meeting.

Following discussion, Mayor Davis stated the appellants and proponent would receive 10 minutes for public comment and individual speakers would receive 90 seconds.

Mayor Davis opened the public hearing.

Miriam Montesinos, representing Sheppard Mullin on behalf of WalMart Stores Incorporated, stated they were in agreement with the staff report. She noted WalMart made the case it was outside the

City's discretion and authority to require an EIR in 2005, however, an EIR was prepared, and it had shown no new significant impacts existed especially with respect to esthetics of the project. In addressing letters from the appellants, she clarified the Council was acting on approving the appeal of the EIR certification and not acting on the resolution appealing the Design Review per the transcript Walmart had prepared of July 27, 2010 Council minutes. In addition, at no point did any Councilmember make a finding indicating the project was not in compliance with the General Plan at the July 27, 2010 meeting. Based on the fact that an EIR should not have been required, she requested the City Council decline acting on the EIR and take action on the Design Review application given the holding in the San Diego Navy Case.

Representing the appellant, Mark Wolfe stated the Council took action to uphold the appeals and deny certification of the EIR on July 27, 2010. He further stated, the letter he submitted, dated August 17, 2010, made the following conclusions:

- The City Council denied the project on July 27, 2010 but the draft resolution failed to reflect that action
- The project was inconsistent with the General Plan and was properly denied on that basis and the resolution of denial should include findings reflecting this.
- The project was not encompassed within the original approvals for Williamson Ranch Plaza and WalMart had no vested right to construct the expansion
- Under governing procedures, the Council may not reconsider the motion to deny which was passed on July 27, 2010

Mr. Wolfe requested the City Council abide by the action taken on July 27, 2010.

Brent Jolley, representing Antioch Citizens for Smart Growth, stated he was in agreement with statements made by Mr. Wolfe this evening. In referencing his letter dated August 17, 2010, he stated they believed Council granted the appeal which applied to the EIR certification and the project approval without limitation or exclusion for the Design Review. Additionally, he noted the San Diego Navy case cited in the staff report was irrelevant and WalMart failed to show that it was applicable prior to the July 27, 2010 public hearing. He requested the City Council approve the resolution Attachment B+ of the staff report with three additions (Exhibit #1) attached to his letter. In summary these include:

- An additional ~~whereas~~ clause regarding the Council's July 27, 2010 Decision
- Additional findings 5 and 6 explaining why the proposal was not consistent with the 1998 approvals and Antioch General Plan, respectively
- Filling in the blank line at the end of the resolution as follows, ~~and deny the Project.~~

In conclusion, he stated the City Council should not have conducted the public hearing that night and he wished it be excluded from the public record.

Mario Estaniol requested the City Council restrict use of the parking lot sweeper, trash compactor, forklifts and delivery trucks from 10 P.M. to 5 A.M.

Mayor Davis reported he received written comment from the following residents indicating they were opposed to the project:

Brian Smith, Brentwood resident; Kathleen Cabral, Antioch resident; Angelo Alaimo, Antioch resident; Richard Jewell, Concord resident; Harry Thurston, Antioch resident; Brad Nobori, Hurcules resident; Joseph Camp, Antioch resident; Michael Young, Erin Dostier Kent, Antioch resident; Jonathan Lee, Oakley resident; Mario Branco, Oakley resident; Jo Daniels, Antioch resident; Brandi Donaldson, Pleasant Hill resident; Richard Capter, Antioch resident; Mike Donaldson, Pittsburg resident; Lindsay Dontaldson, Pleasant Hill resident; Lupe Sanchez, Brentwood resident; Cynthia Basterrechea, Antioch resident; Brigida Calceta, Pittsburg resident; Laurie Lear, Oakley resident; Heather Beard, Brentwood resident; Travis Mast, Oakley resident; Joe Feller, Vallejo resident; Anthony Cox, Antioch resident; Cynthia Gorman, Antioch resident; Peter Lau, Antioch resident; Dino Allisin, Ashley Smith, Brentwood resident; Shirley Sasahama, Concord resident; Lisa Cox, Antioch resident; George Economou, Antioch resident; Mark Rezag, Oakley resident; Marie Moulton, Antioch resident; Marie Kesser, Antioch resident; Deborah Gonsalves, Antioch resident; and Robert Messer, Antioch resident.

Debbie Schneider, Antioch resident representing Antioch Citizens for Smart Growth, requested the City Council deny the EIR and Design Review for the WalMart expansion.

Phil Tucker, representing California Healthy Communities Network, Martinez resident, stated he was represented by Mr. Wolfe, who presented a letter outlining their position on the expansion project. He requested all of their submittals be considered by the City Council this evening and the process be concluded.

Mary Messer thanked the City Councilmembers who voted to deny the WalMart expansion project.

Ronda Foremen, discussed the potential costs to taxpayers should the WalMart expansion be approved and urged the City Council to deny the expansion.

George Van Hasselt, Antioch resident, President of the East County Democrats for Action, stated he felt WalMart should have presented their argument regarding the San Diego Navy court case prior to the Public Hearing on July 27, 2010. He reported he attended the July 27, 2010 City Council meeting and witnessed the Council vote on both appeals.

Richard Mossman, Antioch resident, President of the Antioch Democratic Club, stated several court cases had gone against WalMart. He noted the appeals were denied by the City Council on July 27, 2010 and he requested the City Council deny the expansion.

Angel Luevano, Antioch resident, representing League of United Latin American Citizens (LULAC) urged the City Council to approve the resolution (attachment B) to the staff report.

Eric Thorn, urged the City Council to deny the WalMart expansion project.

Nancy Van Meter, Pittsburg resident, on behalf of Save Mart employees, expressed gratitude to the City Council for upholding the appeals.

Donnice Donaldson, Pleasant Hill resident, thanked the City Council for voting to uphold the appeals and noted she felt the economy would not support an additional grocery retailer.

Paul Seger, Oakley resident, spoke in opposition to the WalMart expansion project.

## **PROPOSERS**

Arne Simonsen, Antioch resident, thanked WalMart and the City Attorney for the staff report and clarified the item was a continuation of the July 27, 2010 to allow the City Attorney to bring forward the

necessary findings based on the City Council discussion. He noted it was an opportunity for the City Council to correct the error to deny the project based on City Ordinances and the General Plan.

Allen Payton, Antioch resident, stated the City Council had no findings to support the decision to deny certification of the EIR. He noted the EIR was not required. Therefore the Council's decision should be based solely on Design Review. He urged the City Council to not break the contract the City had with the building/property owner for expansion of the project.

Manny Soliz, Antioch resident, stated the City Council approved the project in 1998, and the EIRs had reinforced the fact the applicant had met the concerns of the Council. He noted, should the City break the contract with the applicant, the applicant would have a right to litigate, which could take the City into bankruptcy.

Devi Lanphere, Antioch Chamber of Commerce, expressed concern regarding lawsuit exposure facing the City should the City Council deny the WalMart expansion. She urged the City Council to trust in staff and Planning Commission and protect the City by denying the appeal.

Eric Maldonado, Walnut Creek resident, Contra Costa Hispanic Chamber, expressed concern regarding lawsuit exposure facing the City should the City Council deny the WalMart expansion.

Mayor Davis reported he had received written comment from the following residents indicating they supported the project: Iris Archuleta, Antioch resident; Hans Ho, Antioch resident; Amy Hughes, Knightson resident; Tom Siqvedo, Brentwood resident; Debbie Jeremy, Antioch resident; Stephanie Tran, Antioch resident; Mary Ann Johnson, Antioch resident; Phillis McKenna, Eva Murray, Nikki Black, Antioch residents; Norlinda Tecson, Pleasant Hill resident; Brenden Gardner, Antioch resident; Modupeola Oyedeji, Antioch resident; Mino Ghassemi, Antioch resident; Bola Joseph Oyadeji, Antioch resident; Tommy Lo, Angie Wilder, Brentwood resident; Samantha Taylor, Sharon Manwill, Jane Modar, Oakley resident; Susan Hargrove, Antioch resident; Loida Mayo, Brentwood resident; Kianoush Azmoudeah, Antioch resident; Ardeshir Azmoudeh, Antioch resident; Heder Alvndpour, Antioch resident; William Newlove, Brentwood resident; Gianna Guziak, Oakley resident; Eletha Welch, Antioch resident; Stella Brown, Brentwood resident; Gene Brown, Brentwood resident; Phyllis Carpender, Antioch resident; Mahlder Ocran, Antioch resident; Carolyn Helzard, Antioch resident; Jose Perez, Antioch resident; Diane Hoar, Antioch resident; Francis Adu, Antioch resident; Carmen Ochang, Antioch resident; Michael Payton, Pittsburg resident; John Hart, Antioch resident; Luke Navazes, Brentwood resident; Peter Chuen, San Francisco resident; Charence Sumo, Brentwood resident; Benjamin Sherwood III, Bethel Island resident; Christie Page, Antioch resident; Donna Page, Antioch resident and Kris Landry, Antioch resident.

Fred Hoskins, Antioch resident, questioned if the City Council was making decisions on verifiable facts and not allowing competition in the City. He stated he supported the expansion project for WalMart.

Harlan Roberts, Antioch resident, questioned why the majority of the City Council voted against the expansion project.

Melodie and Hoss Ketchum, Antioch resident; Jessica Williams, Oakley resident and Jeff Unbehaun, spoke in support of WalMart and urged the City Council to approve the project expansion.

Tom Lamonthe, Chair Government Affairs Economic Development Committee, encouraged the City Council to attend their meetings and discuss Antioch's issues. He spoke in support of the WalMart expansion and urged the City Council to approve the project.

Earlene Lanter and Kay Power, Antioch residents, spoke in support of the WalMart expansion project.

Elizabeth and Ross Funcannon, expressed concern Antioch could be sued and WalMart would win if the City Council upheld the appeals, adding they did not feel competition would not put existing stores out of business.

Miriam Montesinos, Counsel for Walmart, read a transcript from the last proceeding of the action taken by the City Council regarding the appeal of the FEIR. She noted the Design Review application was not acted on and the project was not denied. She requested the City Council decline action on the EIR as it was not within their legal authority to require an EIR.

Mayor Davis closed the public hearing.

City Attorney Nerland announced there were letters on the dais from M. R. Wolfe and Brett Jolley, both dated August 17, 2010 as well as a letter from Miriam Montesinos, with an attachment from Navigant Consulting dated August 16, 2010, which would be part of the public record.

Mayor Davis declared a recess at 9:24 P.M. The meeting reconvened at 9:43 P.M. with all Councilmembers present.

Councilmember Moore clarified that he believed the official record of the public hearing indicated on July 27, 2010 the motion was made to uphold the appeal from the appellant. He stated he agreed the transcripts referenced only the FEIR; however, the motion was to adopt in totality the appeals before the City Council at the July 27, 2010 meeting.

Councilmember Rocha agreed with Councilmember Moore, adding Council accepted the appeals and brought the item back this evening for the Council to consider the findings.

Councilmember Kalinowski stated he did not vote on the minutes of the July 27, 2010 meeting. He further clarified he did not vote on the Design Review of the project. The action taken was directing staff to come back to the Council on the findings for a vote to deny the FEIR.

Councilmember Parsons agreed with Councilmember Kalinowski noting she was informed the FEIR and Design Review for the project were two separate issues and she did not vote on Design Review.

Councilmember Moore added the Council took an action as a Council majority to support and uphold the appeals presented on July 27, 2010. Additionally, he noted this evening was scheduled to bring forth findings to support the action of the Council to deny the FEIR and associated actions.

In response to Councilmember Kalinowski, City Attorney Nerland discussed the San Diego Navy case cited in the staff report and the options available to the City Council this evening regarding the Design Review application for the WalMart expansion project. In particular, she indicated that the Appellate Court had determined that the scope of environmental review needed to conform to the scope of authority that the Council had in reviewing a design review application, which in that scenario would be limited to design and aesthetic issues.

In response to Councilmember Kalinowski, Miriam Montesinos stated, although WalMart had fundamentally felt an EIR was not necessary, it did one to satisfy staff and the City Council in an effort to allow the process to move forward without delays. Additionally she noted the legal threshold to prepare an EIR was low, therefore the most conservative route was to prepare an EIR.

Councilmember Moore expressed concern the EIR failure to adequately address the impacts to existing businesses or urban decay. He noted there was expert testimony suggesting the impacts to the Deer Valley Plaza would potentially cause the grocery store there to close. He further noted there was

opportunity to bring the San Diego Navy case forward for consideration on July 27, 2010 and now felt it was being used to stop a final action on the FEIR.

In response to Councilmember Moore, Rick Jarvis, Legal Counsel retained by the City of Antioch, discussed the Tracy First v. City of Tracy case and how the San Diego Navy case was applicable to the action of the City Council this evening. He stated it was his opinion the City Council could address the merits of the Design Review application without certifying the EIR.

Councilmember Moore stated the Council had the opportunity to take an action to preserve jobs and prevent urban decay. He stated he was not convinced the San Diego Navy case was applicable to the application.

Mr. Jarvis stated it was his opinion, having analyzed the San Diego Navy case, that the Council had the authority and obligation to address the merits of the Design Review application based upon the laws that govern that application as set forth in the City's code. Furthermore, he noted he had looked at the City's laws and he did not interpret those laws as giving the Council the authority to consider the issue of urban decay on other properties in determining whether or not to approve the Design Review application.

Brett Jolley gave a brief description of the Tracy First case as it related to the exhaustion doctrine and noted their position was issues raised following the close of the public hearing on July 27, 2010 would not be allowed during litigation of any action against the City. Additionally, he noted case law had indicated that once the applicant elected to proceed with CEQA they had an obligation to do so correctly. With respect to the San Diego Navy case, Mr. Jolley stated it had less bearing on the decision of the City Council this evening.

In response to Councilmember Kalinowski, Mr. Jolley stated absent an email sent to the City Council responding to the staff report, there was no other correspondence from his office to the individual City Council Members since July 27, 2010.

Mr. Jarvis further stated should the City Council fail to certify the EIR, he advised the Council to act on the Design Review application separately, applying the standards set forth in the City's ordinances. He gave a brief history of his involvement in defending cities that were sued by WalMart.

A motion was made by Councilmember Moore, seconded by Councilmember Rocha, to approve Attachment B, denying certification of the Environmental Impact Report and project, with the addition of Exhibit #1 attached to the letter from Herum Crabtree Attorneys dated August 17, 2010 which Council Member Moore read into the record.

Councilmember Kalinowski stated he believed the EIR had been adequately addressed, as it was prepared by professional consultants and reviewed by the Community Development Department and the City Attorney. He noted the concerns he articulated for the 2007 application had been addressed and therefore he would not be supporting the motion.

Responding to Councilmember Kalinowski, Councilmember Moore stated he felt the City had received substantial evidence and challenges to the vested rights of the applicant to move on the project. He further noted it was his judgment the Council had discretionary and legislative authority to act in the best interest of the community and the following motion reflected that action.

Councilmember Rocha called for the question and then yielded the floor to Councilmember Parsons.

Councilmember Parsons stated she could not support the motion, noting she felt it would expose the City to a lawsuit.

The motion failed by the following vote:

Ayes: Moore, Rocha

Noes: Kalinowski, Parsons, Davis

A motion was made by Councilmember Parsons, seconded by Councilmember Kalinowski, adopting Attachment ~~A~~<sup>+</sup> - Resolution declining to certify the final environmental impact report for the WalMart expansion project and providing further direction.

Speaking to the motion, Councilmember Kalinowski stated any action on the motion needed to occur on or before September 28, 2010. He requested the City Council be provided with a historical analysis of grocery use in Antioch and the impacts for any expansion granted administratively or by the City Council, that have impacted businesses highlighted in the report as well as across jurisdictional boundaries. He stated he did not believe urban blight would be created with the expansion of WalMart and stated he supported the motion.

Councilmember Parsons stated she supported the motion due to the fact that San Diego Navy case law was brought forward at the public hearing this evening.

Mayor Davis stated he stood behind his previous comments on the project made at the July 27, 2010 Council meeting, and he was encouraged by the positive comments made this evening.

#### RESOLUTION NO. 2010/58

The motion carried by the following vote:

Ayes: Davis, Parsons, Kalinowski, Rocha

Noes: Moore

Mayor Davis declared a recess at 10:52 P.M. The meeting reconvened at 10:57 P.M. with all Councilmembers present.

#### **PUBLIC COMMENTS**

Allen Payton requested clarification regarding the process for posting of the City Council agendas.

Mayor Davis reported the City Council agenda was given to the webmaster on the Thursday prior to the City Council meeting for posting on or before Saturday of the same week.

Nancy Van Meter, Antioch resident spoke in support of the use of medical marijuana.

#### **STAFF COMMUNICATIONS**

City Manager Jakel reminded the City Council the next meetings were scheduled for September 14 and 28, 2010, and he would be following up on scheduling the Quality of Life forum.

#### **COUNCIL COMMUNICATIONS**

Councilmember Kalinowski requested the City Manager agendize the state-wide marijuana initiative for a position of opposition by the Antioch City Council for September.



With no further business, Mayor Davis adjourned the meeting at 11:05 P.M. to the next regular Council meeting on September 14, 2010.

Respectfully Submitted:

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L. JOLENE MARTIN, CMC  
City Clerk