

MEMORANDUM

To: Fairfax Town Council
From: John E. Sharp
Date: March 2, 2011
Re: *Town of Fairfax v. Berg*, Marin County Superior Court,
Case No. CV086177

The purpose of this Memorandum is to provide a report on the status of the above-referenced litigation. This Memorandum is based entirely on materials which appear in the Marin County Superior Court files, which, as such, are public record. This Memorandum is not to be construed as a waiver of the attorney-client privilege, as embodied at California Government Code § 54956.9 which provides, in part, that:

“All expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter.”

As you know, Section 54956.9 allows the Council to confer with its attorneys, in closed session, regarding matters covered by the attorney-client privilege. In my opinion, as long as any public discussion is limited to matters which are already a matter of public record (pleadings, exhibits and transcripts of the above-referenced litigation, as said documents exist in the courts) and as long as your discussions in the public session do not reveal matters of litigation strategies and tactics, the attorney-client privilege will remain in tact. I strongly caution the Council that any discourse with the public should not drift outside the bounds of the matters discussed in this Memorandum, or in the court records.

As to the specific status of the case, you are aware that Judge Taylor entered judgment against the Town and in favor of Mr. and Mrs. Berg on November 23, 2010. On December 20, 2010 the Town, through the undersigned, filed a Motion for New Trial, Motion to Vacate Judgment and Motion to Modify Judgment (Code of Civil Procedure Section 657, et seq.), which was heard on January 13, 2011. Following briefing and argument, the court, without further explanation, denied the Motion for New Trial.

In an abundance of caution, a Notice of Appeal of the court's ruling was filed on February 14, 2011. The Notice of Appeal (a copy of which is attached hereto for your reference) was filed, initially, as a matter of prudence in order to avoid the Town's losing its right to pursue such appeal, should the Town Council ultimately decide to do so. Pursuant to California Rule of Court 8.108, if a Notice of Appeal is *not* filed timely, the

Town has no further remedy and the jurisdiction of the court is waived once and for all, to hear the matter.

The basis for the appeal is, in part, set forth in the documents supporting the Town's Motion for New Trial, Motion to Vacate Judgment and Motion to Modify Judgment. Without delving into privileged material, I can state that questions of law and various bodies of evidence were left unaddressed by the trial court and, as set forth in our documents in support of the above-referenced motions, should constitute the valid basis of an appeal.

The Council is contemplating mechanisms to continue to seek recourse with respect to its property rights, and seeks a sufficient and cost-effective way to do so. In that regard, I have agreed to review the anticipated costs and fees associated with carrying the appeal forward, and to place a "cap" on the cost for pursuing the appeal. Much of the substance of the legal argument supporting the appeal has been briefed at the trial and post-trial stages, such that duplication of work can be avoided, providing certain economies to the Town. As of the date of this writing, I am still engaged in the process of estimating costs based upon the specific tasks which will be required in the appellate process. Those tasks, generally, follow the process described below:

1. The record of proceedings in the trial court is designated by the parties. This is to be done within 10 days of the date of filing the Notice of Appeal, subject to extension of time by the court and a grace period built into the appellate court rules.
2. When the trial transcripts have been prepared, they are forwarded to the Court of Appeal by the trial court clerk. At or about that time, the appellate court clerk provides notice that the trial court records are on file with the court of appeal, and provides that Appellant's (the Town's) opening brief shall be filed by a certain date, which is estimated to be 4 to 6 months in the future. Following the filing of Appellant's opening brief, Respondents (the Bergs) have the opportunity to file an opposition brief within 30 to 60 days, followed by the Appellant's opportunity to file a final reply brief.
3. Once all briefs have been filed, the court notifies the parties of the opportunity to participate in oral argument, if desired. At that juncture, a determination would be made as to whether either or both parties wish to proceed with oral argument. If so, a hearing date is set (probably 8 to 12 months from the date of filing of the Notice of Appeal).
4. If the parties waive oral argument, the court simply proceeds to render its written opinion, usually within 90 days of submittal of the matter to the court or, if there is oral argument, within approximately 90 days of such oral argument. (Again, in my experience, the Court of Appeal renders its opinion in a substantially shorter period of time; however 90 days is a generally recognized rule of thumb during which to expect an opinion.)

5. An important consideration regarding the above-described process is that, shortly following designation of the record at the trial level, the Court of Appeal sends the parties a questionnaire designed to evaluate whether the case is appropriate under appellate court guidelines for mediation by one of the appellate court's panelists. As with all civil litigation, the courts strongly favor mediation, a process for alternative dispute resolution. In the matters in which the undersigned has participated in appellate mediation on behalf of public agencies, I make the general observation that mediation has, for the most part, been beneficial.

At the risk of being redundant, I again caution the Council that legal opinions as expressed to the Council in closed session are protected by attorney-client privilege and the attorney work-product doctrine. I respectfully request that, in discussing this matter as a regular agenda item, the Council err on the side of caution with regard to discussion of any tactics or strategies that the Town Attorney or the undersigned may have discussed with you in closed session. The ability for the Council to communicate candidly and privately with its lawyers is strongly protected provided that those privileges are not waived. As an observation, anyone interested in the product of the legal theories upon which the Town has relied in seeking to protect its property rights can be reviewed either at the Marin County Superior Court or simply upon request by any member of the public through the Town offices.

Very truly yours,

A handwritten signature in cursive script that reads "Allen Le Sharp". The signature is written in black ink and is positioned below the typed name "Allen Le Sharp".

18. Discussion/Consideration of possible consolidation of the Planning Commission and the Design Review Board – Planning
19. Adoption of Resolution No. 11-16, Establishing a General Plan Implementation Committee and Setting the Membership and Terms – Planning
20. Discussion/Consideration of a local sales tax in the Town of Fairfax – Bragman
21. Discussion/Consideration of allocation of \$2500 from Measure I Youth Services funds to the West Marin Little League for the completion of the batting cage at Contratti Field – Bragman
22. Consideration of the use of Open Space funds for litigation related to protecting access rights to Town owned open space - Bragman

ADJOURNMENT

If any of the matters described above are challenged in court, you may be limited to raising only those issues you or someone else raised at any public hearing described on this agenda, or in written correspondence delivered at, or prior to, this Council meeting. If you need an accommodation to attend or participate in this meeting due to disability, please contact Town Hall at 453-1584

Materials related to an item on this Agenda submitted to the Council after distribution of the agenda packet are available for public inspection on the public counter at Town Hall in a folder next to the agenda packet. Such documents are also available on the Town's Web site at "townoffairfax.org" subject to staff's ability to post the documents before the meeting.

I, Judy Anderson, Town Clerk of the Town of Fairfax, County of Marin, State of California, do hereby certify that I posted a copy of this Agenda at three public places in the Town of Fairfax, to wit: 1) Bulletin Board, Town Hall Offices; 2) Bulletin Board, Fairfax Post Office, and 3) Bulletin Board, Fairfax Women's Club and that each of said postings was completed on February 24, 2011.

In an effort to make our agendas available in a more timely and efficient manner, we have created a noticing list for the distribution of Town Council agendas via email. If you would prefer to receive Town Council agendas via email, please provide your email address to the Town Clerk at janderson@townoffairfax.org

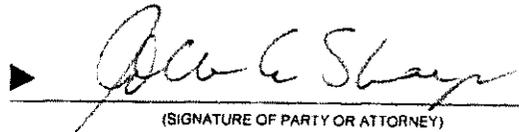
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): John E. Sharp, Esq. (SBN 085615) Law Offices of John E. Sharp 930 Irwin Street, Suite 216 San Rafael, CA 94901 TELEPHONE NO: (415) 479-1645 FAX NO. (Optional): (415) 479-2648 E-MAIL ADDRESS (Optional): john@johnsharpplaw.com ATTORNEY FOR (Name): Plaintiff TOWN OF FAIRFAX	FOR COURT USE ONLY <div style="text-align: center; font-size: 2em; font-weight: bold; border: 1px solid black; padding: 5px;">FILED</div> <div style="text-align: center; font-size: 1.2em; font-weight: bold;">FEB 14 2011</div> <div style="text-align: center; font-size: 0.8em;"> KIM TURNER Court Executive Officer MARIN COUNTY SUPERIOR COURT By F. Turner, Deputy </div>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN STREET ADDRESS: 3501 Civic Center Drive MAILING ADDRESS: P.O. Box 4988 (94913) CITY AND ZIP CODE: San Rafael, CA 94903 BRANCH NAME:	
PLAINTIFF/PETITIONER: TOWN OF FAIRFAX DEFENDANT/RESPONDENT: JOHN BERG and MARLIA BERG	
<input checked="" type="checkbox"/> NOTICE OF APPEAL <input type="checkbox"/> CROSS-APPEAL (UNLIMITED CIVIL CASE)	CASE NUMBER: <div style="text-align: center; font-size: 1.1em; font-weight: bold;">CV 086177</div>
Notice: Please read <i>Information on Appeal Procedures for Unlimited Civil Cases</i> (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.	

1. NOTICE IS HEREBY GIVEN that (name): **Plaintiff TOWN OF FAIRFAX**
 appeals from the following judgment or order in this case, which was entered on (date): **January 19, 2011**
- Judgment after jury trial
 Judgment after court trial
 Default judgment
 Judgment after an order granting a summary judgment motion
 Judgment of dismissal under Code of Civil Procedure sections 581d, 583.250, 583.360, or 583.430
 Judgment of dismissal after an order sustaining a demurrer
 An order after judgment under Code of Civil Procedure section 904.1(a)(2)
 An order or judgment under Code of Civil Procedure section 904.1(a)(3)-(13)
 Other (describe and specify code section that authorizes this appeal):
CCP Sec. 904.1; Order Denying Pl.'s Mot. for New Trial; to Vacate Judgment; and to Modify Jdgmnt.
2. For cross-appeals only:
- a. Date notice of appeal was filed in original appeal:
- b. Date superior court clerk mailed notice of original appeal:
- c. Court of Appeal case number (if known):

Date: February 11, 2011

John E. Sharp, Esq.

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

CASE NAME: Town of Fairfax v. Berg	CASE NUMBER: CV 086177
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NOTICE TO PARTIES: A copy of this document must be mailed or personally delivered to the other party or parties to this appeal. A PARTY TO THE APPEAL MAY NOT PERFORM THE MAILING OR DELIVERY HIMSELF OR HERSELF. A person who is at least 18 years old and is not a party to this appeal must complete the information below and mail (by first-class mail, postage prepaid) or personally deliver the front and back of this document. When the front and back of this document have been completed and a copy mailed or personally delivered, the original may then be filed with the court.

PROOF OF SERVICE

Mail Personal Service

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My residence or business address is (*specify*):
930 Irwin Street, Suite 216, San Rafael, CA 94901
3. I mailed or personally delivered a copy of the *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* as follows (*complete either a or b*):
 - a. **Mail.** I am a resident of or employed in the county where the mailing occurred.
 - (1) I enclosed a copy in an envelope and
 - (a) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (b) placed the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
 - (2) The envelope was addressed and mailed as follows:
 - (a) Name of person served: Neil Sorensen, Esq.
 - (b) Address on envelope:
950 Northgate Drive, Suite 107
San Rafael, CA 94903
 - (c) Date of mailing: February 11, 2011
 - (d) Place of mailing (*city and state*): San Rafael, CA
 - b. **Personal delivery.** I personally delivered a copy as follows:
 - (1) Name of person served:
 - (2) Address where delivered:
 - (3) Date delivered:
 - (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: February 11, 2011

Andrea E. Axelsen

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)