

CITY OF SAN CLEMENTE

City Council Minutes

Special Meeting – November 23, 2020

These minutes reflect the order in which items appeared on the meeting agenda and do not necessarily reflect the order in which items were actually considered.

A Special San Clemente City Council meeting was called to order on November 23, 2020 at 6:02 p.m. by Mayor Pro Tem Ferguson. The meeting was conducted via teleconference.

PRESENT HAMM, JAMES, WARD, MAYOR PRO TEM FERGUSON

ABSENT NONE

STAFF PRESENT Erik Sund, Interim City Manager; Scott Smith, City Attorney; Joanne Baade, City Clerk; Lori Beyer, Office Specialist I

Pledge of Allegiance

Councilmember James led the Pledge of Allegiance.

1. **Oral Communications (Part 1)**

City Clerk Staff read the following comment:

Sandy Exellby, communication dated November 23, 2020, urging City officials to make Covid-19 safety protocols a priority.

2. **Motion Waiving Reading in Full of All Resolutions and Ordinances**

MOTION BY COUNCILMEMBER WARD, SECOND BY MAYOR PRO TEM FERGUSON, CARRIED 4-0, to waive reading in full of all Resolutions and Ordinances.

3. **Council Consideration of Censure of Mayor Pro Tem Ferguson**

Hearing related to the possible censure of Mayor Pro Tem Ferguson.

MOTION BY COUNCILMEMBER WARD, SECOND BY COUNCILMEMBER HAMM, to appoint Councilmember James to chair the portion of this meeting relating to the possible censure of Mayor Pro Tem Ferguson.

Following discussion, the motion on the floor was voted on and CARRIED 3-1 (MAYOR PRO TEM FERGUSON VOTING NAY).

Councilmember James assumed the duties of the chair.

MOTION BY COUNCILMEMBER JAMES, SECOND BY MAYOR PRO TEM FERGUSON, CARRIED 4-0, to allow each side of the censure issue 75 minutes to present their positions and an additional 15 minutes for closing remarks.

Councilmember Ward reviewed the foundation for the proposed censure of Mayor Pro Tem Ferguson.

Brad Malamud and Mike Winsten, co-attorneys representing Mayor Pro Tem Ferguson, rebutted the grounds for censure as presented.

City Clerk staff read communications as follows:

Craig Alexander, communication dated November 20, 2020
Steven Marshall, communication dated November 23, 2020
Jim Dahl, communication dated November 21, 2020
Michelle (last name not provided), communication dated November 21, 2020
Anonymous, communication dated November 23, 2020
Nicole J (full name not provided), communication dated November 22, 2020
Luz Villavicencio, communication dated November 22, 2020
Patricia Hoskins, communication dated November 22, 2020
R (full name not provided), communication dated November 22, 2020
Craig Neil, communication dated November 23, 2020
Marina (full name not provided), communication dated November 23, 2020
Alan Hostetter, communication dated November 23, 2020
Ann-Marie Hines, communication dated November 23, 2020
Eric Ward, communication dated November 23, 2020
Susan Nespor, communication dated November 23, 2020
Dawn Urbanek, communication dated November 23, 2020
Debbie Flowers, communication dated November 23, 2020
Anonymous, communication dated November 23, 2020
Kristine Hostetter, communication dated November 23, 2020
Concerned Citizen, communication dated November 23, 2020
Sharon Heider, communication dated November 23, 2020
Mel Ph (full name not provided), communication dated November 23, 2020
Sherry Nolan, communication dated November 23, 2020
Concerned Citizen, communication dated November 23, 2020
Susan Smith and Ken Orr, communication dated November 23, 2020
Thor Johnson, communication dated November 23, 2020
Janine Heft, communication dated November 23, 2020

Tony Rubolino, communication dated November 23, 2020
Karen Prescott-Loeffler, communication dated November 23, 2020
Anonymous, communication dated November 23, 2020
Kathy Owens, communication dated November 23, 2020
Diane Doherty, communication dated November 23, 2020
Matthew Flowers, communication dated November 23, 2020
Anonymous, communication dated November 23, 2020
25-Year Resident of San Clemente, communication dated November 23, 2020
Diek Van Nort, communication dated November 23, 2020
Ryan Alexander Flowers, communication dated November 23, 2020
Jennifer M. Sterling, communication dated November 23, 2020.
Anonymous, communication dated November 23, 2020
James Monroe, communication dated November 23, 2020

MOTION BY COUNCILMEMBER HAMM, SECOND BY COUNCILMEMBER WARD, CARRIED 4-0, to close public comments.

MOTION BY COUNCILMEMBER WARD, SECOND BY MAYOR PRO TEM FERGUSON, CARRIED 4-0, to continue the meeting past 11:00 p.m.

City Attorney Smith requested that Council recess to enable him to prepare an annotated version of the draft Resolution to reflect issues that Council may wish to discuss further or exclude from the Resolution.

MOTION BY COUNCILMEMBER HAMM, SECOND BY COUNCILMEMBER WARD, CARRIED 4-0, to recess at 10:35 p.m. to 10:55 p.m.

MEETING RECONVENED

Council reconvened at 10:56 p.m., with all members present.

MOTION BY MAYOR PRO TEM FERGUSON, SECOND BY COUNCILMEMBER JAMES, CARRIED 4-0, to re-open public comments.

City Clerk staff read communications as follows:

Erick Ferguson, communication dated November 22, 2020
Joe Janis, communication dated November 23, 2020
Toni O (full name not provided), communication dated November 23, 2020

MOTION BY COUNCILMEMBER JAMES, SECOND BY COUNCILMEMBER HAMM, CARRIED 4-0, to close public comments.

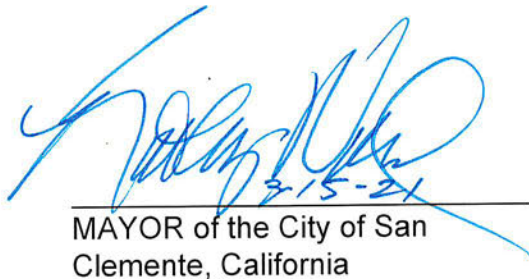
MOTION BY COUNCILMEMBER HAMM, SECOND BY COUNCILMEMBER JAMES, CARRIED 3-1 (MAYOR PRO TEM FERGUSON VOTING NAY), to adopt Resolution No. 20-63 entitled RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, CENSURING MAYOR PRO TEM LAURA FERGUSON FOR UNACCEPTABLE CONDUCT, with the modifications made and outlined this evening by City Attorney Smith.

4. **Oral Communications (Part 2)**

None.

5. **Adjournment**

MOTION BY COUNCILMEMBER HAMM, SECOND BY COUNCILMEMBER WARD, CARRIED 4-0 to adjourn at 11:46 p.m. The next Regular Council Meeting is scheduled to take place on December 1, 2020. Closed Session items will be considered at 5:00 p.m. and the Regular Business Meeting will commence at 6:00 p.m.



MAYOR of the City of San
Clemente, California



CITY CLERK of the City of
San Clemente, California

November 23, 2020 – Item 3 – Public Comments

Campagnolo, Laura

From: Karen Beaulieu [REDACTED]
Sent: Sunday, November 22, 2020 9:05 PM
To: Baade, Joanne; Campagnolo, Laura
Subject: Laura Ferguson

Importance: High

Hello,

I recognize that Laura Ferguson is not favored by certain council members, apparently she has a voice that differs from theirs, and she also does not concede to an agenda. Since when is having a different opinion unacceptable? We need diversity in leadership. We need checks and balances. I am disappointed in how the council is handling diversity. Sounds like adult bullying to me.

The latest, to spend taxpayer's dollars and staff time on a censure process and hearing, really???? Is this what the city needs most right now? Negative energy that could be better used to bring something positive to our community.

If the city is trying to figure out ways to spend taxpayer's dollars, then consider instead donating the money to families that are struggling with the current economic challenges; this would be a much better use of taxpayer dollars. FAM would be thrilled to receive a donation!

Please stop this nonsense and accept that not everyone is of the same thought process and try working together instead of against each other for a change. And please stop wasting our hard-earned money!

Regards,

Karen Beaulieu
San Clemente Resident



Karen Beaulieu

www.mis-c.com

503.614.1919 *United States office*

604.837.0002 *Canadian office*

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Campagnolo, Laura

From: Erick Ferguson [REDACTED]
Sent: Sunday, November 22, 2020 4:39 PM
To: Campagnolo, Laura
Subject: Laura Ferguson

Sent from my iPhone

Hi this is Erick Ferguson, I'm writing to talk about my moms first amendment right to have freedom of speech. The other members of the city council should not be able to take away her first amendment right. From hearing about another council member Chris Ham, trying to show that he is the better person by kicking and saying rude comments to the council member. Even though it may sound like I'm trying to defend my mom, it's also about rights that was formed under one people the United States of America. We're all the people came together to form on nation and union to gave us the rights to do and say what we want to. Also the laws and orders of this country, and what is he doing surfing during pandemic when the beach is closed? What a disrespect to our city. She was elected to serve our city and try to lead us into a better way so our city can be great. But by trying to silence the one person trying to change our city for it better what is going to happen, nothing. This email is showing the people how we need to protect city council woman Laura Ferguson's right. We all have the right to speak and why shouldn't she?

Thank You
Erick Ferguson

Campagnolo, Laura

From: Susan Fischbach [REDACTED]
Sent: Thursday, November 19, 2020 5:59 AM
To: Campagnolo, Laura
Subject: Support censure

I do support the censure.

Susan Fischbach
San Clemente, CA 92672

Campagnolo, Laura

From: Fred [REDACTED]
Sent: Monday, November 23, 2020 7:15 AM
To: Campagnolo, Laura
Subject: public comment for special hearing today 11/23

What is city hall hiding? Why are you so scared of Mayor Pro Tem Ferguson telling the truth to the extent that you are willing to waste taxpayer money on this sham hearing constructed by Sund and Smith and overseen by attorney Talley? Afraid of more lawsuits? Talley sued the City of Anaheim for over 1.4 million, an attorney who files lawsuits, she doesn't stop them. The dark dysfunction and corruption of city hall started with the arrival of Eric Sund and the BBK onboarding and has expanded over the years enabled by Hamm and Ward with James now falling in line. Mayor Pro Tem is an insider, which is why thousands of residents elected her for her knowledge, insight and transparency with hopes that she would clean out the skeletons in the closet. All you have done here tonight is demonstrated how scared and secretive you really are about hiding those skeletons. New council members arriving in a week, ethical attorneys with discernment of the law to support Laura and see through Sund and BBK's hiring of corrupt experts, investigators and sham attorneys like Talley who are ushered in to enable their deep state dysfunction. One week can't come soon enough.

Baade, Joanne

From: Baade, Joanne
Sent: Friday, November 20, 2020 8:39 AM
To: City Council Distribution
Subject: FW: Laura Ferguson Censure

Councilmembers:

The below email was received with regard to Monday's Council meeting.

Joanne

-----Original Message-----

From: Gary or Julie [REDACTED]
Sent: Thursday, November 19, 2020 8:40 PM
To: CityClerk Mail <CityClerk@san-clemente.org>
Subject: Laura Ferguson Censure

The censure contemplated against Laura Ferguson is a meaningless gesture that wastes time and money. The residents are not well served by this petty endeavor. Freedom of speech and government transparency should be encouraged, not thwarted. I am very opposed to this course of action taken by some members of the city council. Please confirm receipt of my comments.

Thank you.

Julie Gladden

Baade, Joanne

From: Baade, Joanne
Sent: Friday, November 20, 2020 8:43 AM
To: [REDACTED]
Subject: Laura Ferguson Censure

Ms. Gladden:

Your below email has been received and will be forwarded to the City Council.

Joanne Baade
City Clerk

-----Original Message-----

From: Gary or Julie [REDACTED]
Sent: Thursday, November 19, 2020 8:40 PM
To: CityClerk Mail <CityClerk@san-clemente.org>
Subject: Laura Ferguson Censure

The censure contemplated against Laura Ferguson is a meaningless gesture that wastes time and money. The residents are not well served by this petty endeavor. Freedom of speech and government transparency should be encouraged, not thwarted. I am very opposed to this course of action taken by some members of the city council. Please confirm receipt of my comments.

Thank you.

Julie Gladden

Campagnolo, Laura

From: James Hogan [REDACTED]
Sent: Monday, November 23, 2020 1:23 PM
To: Campagnolo, Laura
Subject: special meeting 11/23

In the midst of a global pandemic and economic crisis, councilmembers Ward, Hamm and James vote to enable Sund and Smith to burn public funds to hold a fraudulent trial for no cause other than to silence Mayor Pro Tem. Silence her why? Because you voted to give taxpayer money away to James Makshanoff for no reason versus making him prove his baseless claims in court? Wasn't he named for retaliation and wrongful termination in other lawsuits? Are you covering for him? Or, wait for it.....guess who is the city attorney for the city of Pomona, BBK. Wow, just wow, it doesn't get any darker than this with Kristina Talley, another attorney from BBK that also sued City of Anaheim.

Disgraceful, destructive and damaging to San Clemente. Your fake hearing on Thanksgiving week will go down in San Clemente history as a malicious effort to silence a Mayor Pro Tem while concealing corruption and giving away money to a corrupt ex-city manager and many other pernicious acts that hopefully come to light with new council members.

Campagnolo, Laura

From: David Hurwitz [REDACTED]
Sent: Thursday, November 19, 2020 8:28 AM
To: Campagnolo, Laura
Subject: Censure hearing

As a resident of San Clemente at [REDACTED] 92673, I do support the Censure of Laura Ferguson.

Thank you,

David Hurwitz

Baade, Joanne

From: Baade, Joanne
Sent: Monday, November 23, 2020 9:28 AM
To: Kristina Krich
Cc: City Council Distribution
Subject: RE: PUBLIC COMMENTS FOR NOV 23 MEETING

Ms. Krich:

This email confirms receipt of your below communication, which is being forwarded to members of the City Council.

Joanne Baade
San Clemente City Clerk

From: Kristina Krich [REDACTED]
Sent: Sunday, November 22, 2020 4:26 PM
To: Baade, Joanne <BaadeJ@san-clemente.org>
Subject: Fwd: PUBLIC COMMENTS FOR NOV 23 MEETING

----- Forwarded message -----

From: **Kristina Krich** [REDACTED]
Date: Sun, Nov 22, 2020 at 4:11 PM
Subject: PUBLIC COMMENTS FOR NOV 23 MEETING
To: <CampagnoloL@san-clemente.org>

Dear Council,

Council member Ward's choice to publicly attack Mayor Pro Tem Ferguson needs to be addressed by the public. Why are councilmembers Ward, Hamm and James so intimidated by the information Mayor Pro Tem Ferguson is providing the public? She has not shared anything unlawful and I am appreciative of her efforts to ensure transparency, particularly when the rest of council seems to favor secrecy.

Council members, we are watching you. You can try to hide behind your keyboards, but someday you will need to face us and answer to us. We will remember your legacy of cowardly and unAmerican behavior.

You have no right to censor Mayor Pro Tem Ferguson and the more you attempt it, the worse you look to the public. You should be serving the public with honesty and transparency, and follow Ms. Ferguson's lead. What a thankless job it is for her to try and do right by the public only to be met with these kinds of unfounded and superfluous allegations. If you're embarrassed or ashamed of information the Mayor Pro Tem has shared, then maybe you should rethink some of your decisions. But you will not censor her First Amendment rights nor try to publicly shame her for keeping the public informed. You are only making fools of yourselves and eroding what little credibility you might have had.

Mayor Pro Tem Ferguson is the only one who is doing an honest job on the council anyway. What are the rest of you so eager to hide? Why do you not record any minutes for closed sessions? If you are doing honest work,

it should all be documented. Not recording minutes creates confusion and a lack of transparency, once again. I suggest you all rethink your position, consider the consequences of this action and what message you are sending to your constituents.

Regards,

Kristina Krich

Campagnolo, Laura

From: Sarah Lopez [REDACTED]
Sent: Monday, November 23, 2020 3:36 PM
To: Campagnolo, Laura

I read the resolution and it looks like it was written by the city manager but we haven't had one since January. We only have an assistant in an acting position.. Doesn't the interim city manager work for the council? It looks like the points were written by the interim city manager to try and defend himself and his actions. We also have two new council members starting next week. The voters elect council members and expect them to uphold, protect and keep the city safe. Mayor Pro Tem has been trying to protect the city from corruption and wasting money like they are tonight. She also tried to protect a San Clemente business, which is listed in the resolution, how is that a bad thing, the whole community supports them?

Instead of recruiting and hiring a permanent city manager, council members instead waste time and money, at the expense of the residents, to bully Mayor Pro Tem in a public forum. Smells like cover up. Hopefully new council members arrive and do their job and hire a permanent city manager to clear out city hall corruption and don't just go along to get along.

Important to note - I submitted a public comment for the 11/17 meeting but the city did not read it.

Sarah

Baade, Joanne

From: Brad Malamud [REDACTED]
Sent: Friday, November 20, 2020 12:04 PM
To: Ward, Kathy; Hamm, Chris; James, Gene; Ferguson, Laura; Scott Smith; ctalley@talleylawyers.com; Baade, Joanne
Cc: Mike Winsten; Brad Malamud
Subject: Letter to City re: recusal and demands regarding Censure of Mayor Pro-Tem Ferguson; Nov. 17 Council Meeting actions and vote, and Nov. 23, 2020 hearing
Attachments: Letter for Recusal and Demand .pdf

Please find the attached email/letter for your attention and review.

I expect after you have read this email/letter you will agree it is improper and illegal for the scheduled November 23, 2020 censure hearing to go forward.

I request you respond to the email/letter, no later than 4pm November 23, 2020, and indicate that either the hearing is cancelled, or the basis for your decision that there is a legal basis for the meeting to be held. At that time, please inform me as to the name and contact information for the hearing officer. Please also inform me whether Cristina Talley, Esq. and/or Scott Smith, Esq., has recused herself or himself and if either or both have recused, the identity of the attorneys that will be serving in his/her place.

If you have any questions or want to discuss anything related to the email/letter, you can call or email me 24 hours a day.

Thank you in advance for your prompt reply(s).

Brad Malamud¹
Michael S. Winsten²

November 20, 2020

To:

Councilmember Kathy Ward – By email: wardk@san-clemente.org
Councilmember Chris Hamm – By email: hammc@san-clemente.org
Councilmember Gene James – By email: jamesg@san-clemente.org
Councilmember Laura Ferguson – Fergusonl@san-clemente.org
City Clerk Joanne Baade – baadej@san-clemente.org
Cristina Talley, Esq. – By email: ctalley@talleylawyers.com
Scott C. Smith, Esq., City Attorney – scott.smith@bbkllaw.com

By email only except also by fax to City Clerk @ (949) 361-8309

Re: Illegal Action to Discuss and Vote to hold a hearing to Censure Mayor Pro-Tem Ferguson

We are legal counsel and advisors to Mayor Pro-Tem Ferguson. We felt it was important to respond to the illegal actions of the Council on Tuesday November 17, 2020 on Agenda Item #9C, noticed as Direction to Staff regarding Censure Process.³

On November 17, 2020,⁴ the Council discussed and then voted to hold a hearing to censure Mayor Pro-Tem Ferguson in spite of the fact that nothing on Agenda 9C informed the public or Mayor Pro-Tem Ferguson any such action was contemplated. The discussion and vote were Brown Act violations thus invalidating the November 23, 2020 censure hearing. Therefore, the City cannot proceed with the November 23, 2020 hearing for reasons set forth below and other reasons not set forth herein. Therefore, any action or hearing to censure Mayor Pro-Tem Ferguson is illegal and must be abandoned.

. In San Clemente, there is no ordinance allowing the Council to censure another member.

No hearing is permitted, and a November 23, 2020 hearing cannot proceed because censure and a censure hearing is not supported by San Clemente law.

Both Cristina Talley and Scott Smith have a conflict of interest with Mayor Pro-Tem Ferguson under California State Bar Rules and are required to recuse themselves.⁵

¹ Brad Malamud [REDACTED] SBN: 80361.

² Michael S. Winsten 949-633-5458, [REDACTED] SBN: 126554.

³ This letter will not address any notice from the City, Ms. Talley, or Mr. Smith to Mayor Pro-Tem Ferguson.

⁴ Agenda Item 9C did not include any statement related to setting a hearing to censure Mayor Pro-Tem Ferguson. Therefore, the discussion and vote for the November 23, 2020 hearing violated the Brown act and was illegal, improper, and not permitted.

⁵ See Cal. State Bar Rules of Professional Conduct Rule 1.11, 1.7 and 1.8.2 and other related rules and regulations.

Many of Mayor Pro-Tem Ferguson's due process and notice rights are included in the City's Administrated Hearing in the Municipal Code and any attempt by the City Council majority, City Attorney Scott Smith, and Ms. Cristina Talley to limit those rights is an act of bad faith and is illegal. The process to be followed cannot be established for the first time at the November 23, 2020, hearing, as Scott Smith indicated at the November 17, 2020.⁶ The process is set-forth by ordinance related to administrative hearings.

It is Mayor Pro-Tem Ferguson's request that this email/letter is included as an exhibit to her censure hearing if that hearing takes place. This email/letter is not a substantive response to the Notice which was provided to Mayor Pro-Tem Ferguson late on November 19, 2020.

Mayor Pro-Tem Ferguson requests that this email/letter be forwarded to the hearing officer when a hearing officer is appointed and survives any challenge. A hearing officer is required under the Municipal Code for all administrative hearings.

As described above, there is no basis for a hearing on Censuring Mayor Pro-Tem Ferguson as there is no San Clemente ordinance or law allowing the Council to Censure her. That alone suffices to end this charade.

However, in the interest of providing Scott Smith, Cristina Talley, City Staff, City Manager, and the Council Members with as comprehensive a list of their violations that was possible given the short notice and time constraints, and to provide legal notice of each objection to moving forward with a November 23, 2020 hearing, the remainder of this email/letter will outline and provide limited details on other grounds regarding recusal, due process, adequate notice, violation of the Brown Act, and similar rights and rules that limit, restrict, and/or prohibit the timing, nature, and procedures related to an attempt to censure Mayor Pro-Tem Ferguson.

As background, censure is not proper for mere speech. Speech is protected by the Constitution and that right has been withheld in every challenge. Yet most of the supposed grounds for censure in the Notice are pure speech.

Most if not all the charges stem directly from Mayor Pro-Tem Ferguson's exercise of speech; something that is 100% protected from censure.

MAYOR PRO-TEM FERGUSON IS A CITY EMPLOYEE AND HAS NOT BEEN AFFORDED THE RIGHTS UNDER THE CITY'S PERSONEL ORDINANCE

Mayor Pro-Tem Ferguson works for the City, and receives an annual W-2 for employees. Employees have many rights that protect them from attack and abuse. A discussion of those

⁶ Due Process rights include right to counsel, right to confront her accusers, right to call witnesses, right to appeal, right to cross-examine witnesses, right to have reasonable notice prior to the hearing, and the right to have an impartial decision maker. It is plain as daylight that the majority City Council members, Mr. Smith and Mr. Sund are not impartial. They, along with Mr. Smith and Mr. Sund are also witnesses which disqualifies them from further participation in this proceeding.

rights including privacy rights is beyond the scope of this letter given the short time available to respond to the City's Notice.

However, this short time frame does not allow the City to avoid application of every right, including notice of each right, to Mayor Pro-Tem Ferguson.

At the present time, Mayor Pro-Tem Ferguson has not been provided any notice of her rights and believes that many of these rights will be violated at the November 23, 2020 hearing based on the nature of the proposed hearing, and the statements made by Ms. Talley and Mr. Smith regarding Mayor Pro-Tem Ferguson's rights to counsel that may be limited to a mere presentation of 3 minutes (or 10 minutes) as applies to every speaker or every applicant, their failure to recuse themselves, and for many other reasons not set-forth herein.

Discussions and Issues raised in the November 17, 2020 hearing on Item 9C:

Statements by Ward and Smith

Kathy Ward stated on the record that:

"I am the council member that asked it [this item] to come back."

When Mayor Pro-Tem Ferguson asked to discuss the factual basis for censure, Kathy Ward stated: "It's not appropriate. It was not agendized."

Correct. That is exactly our point! And neither was setting a hearing to censure Mayor Pro-Tem Ferguson. If there was no agenda for discussion of issues related to censure of Mayor Pro-Tem Ferguson, then a hearing to censure Mayor Pro-Tem Ferguson was not agendized.

Yet both attorneys, who owe Mayor Pro-Tem Ferguson the same duties to the public, and the truth, Scott Smith and Cristina Talley, said nothing. Instead, they allowed the Council to call a vote and vote to set a censure hearing date, in clear violation of the Brown Act. It appears even Council Member Ward was likely aware of the violation, but in an attempt to skirt the Brown Act violation, though she could limit discussion to a vote. The vote was not proper.

Mayor Pro-Tem Ferguson then asked Cristina Talley to recuse herself.

Ms. Talley responded it is true she worked for BB&K for a number of years but left 2 years ago. Since that time, she has worked as a purportedly "independent" City Counsel for the City of San Clemente said there are no grounds for recusal. This is exactly the reason she must recuse herself. Cristina Talley, whether intentionally or not, failed to state on the record she had served as Deputy City Attorney for the City of San Clemente and had worked on matters with Mayor Pro-Tem Ferguson.

Scott Smith stated on the record:

I will be counsel for the hearing body. Cristina Talley will be council for the moving Council members in favor (the Council majority).

If the City is paying and allowing an attorney to represent the moving Council members, then the City has a duty to afford Mayor Pro-Tem Ferguson attorneys

of her choosing at City expense and to allow those attorneys the same rights as Ms. Talley.

Mayor Pro-Tem Ferguson hereby requests and demands the City pay for her attorneys to defend herself from the censure hearing because the City made the decision to provide counsel to the majority Councilmembers (and for other reasons set forth below).

Scott Smith said Mayor Pro-Tem Ferguson's attorneys can participate like any other members of the public. He said this is an administrative hearing and rules of evidence don't apply.

Scott Smith continued:

Mayor Pro-Tem Ferguson's attorneys can participate to their hearts content, but it's not a court proceeding. It's a public hearing and Ferguson will have time to speak. We can decide how to order that at that time.

Mr. Smith failed to inform the public that the San Clemente Municipal Code contains rules for all administrative hearings.

Comments:

City Attorney Smith defined the November 23, 2020 hearing as **an administrative hearing called by the City Council majority**. Mayor Pro-Tem Ferguson agrees. Administrative hearings are not controlled by City Attorney Scott Smith, but by a hearing officer under the rules of the San Clemente Municipal Code Section 1.20.080. Under those rules, set forth below, the Mayor Pro-Tem Ferguson is entitled to a continuance.

THIS LETTER INFORMS THE CITY THAT IT FAILED TO APPOINT A HEARING OFFICER AT ITS OWN EXPENSE. FOR THIS REASON, THE HEARING CANNOT PROCEED ON NOVEMBER 23, 2020 AND CANNOT PROCEED UNTIL A HEARING OFFICER IS APPOINTED AND THE TIME REQUIRED THEREAFTER TO CHALLENGE THAT HEARING OFFICER HAS EXPIRED.

Mayor Pro-Tem Ferguson did not call for the administrative hearing. It was requested by Kathy Ward (see above) and voted upon and approved 3-1.

Under the rules for administrative hearings, SCMC Section 1.20.080, a hearing officer is required.

D. Hearing Officer.

- 1. The City Manager shall appoint a person or persons who shall preside at the hearing and hear all facts and testimony presented and deemed appropriate (Hearing Officer).**
- 2. Any person designated to serve as a Hearing Officer is subject to disqualification for bias, prejudice, interest, or for any other reason for which a judge may be disqualified pursuant to Code of Civil Procedure Section 170.1. The offender may challenge the Hearing Officer's impartiality by filing a statement with the City Manager objecting to the hearing before the Hearing Officer and setting forth the grounds for disqualification. The question of disqualification shall be considered**

and determined in writing by the City Manager within ten days following the date on which the disqualification statement is filed.

The City Manager is required to appoint a person as a hearing officer. Once appointed, the hearing officer is subject to disqualification.

First, the City Manager has failed to appoint a hearing officer, as required. Second, Mayor Pro-Tem Ferguson has not been afforded the opportunity to challenge the hearing officer based on bias, prejudice, interest or any other reason.

THIS LETTER IS A FORMAL DEMAND FOR A CONTINUANCE, PURSUANT TO THE TERMS OF 1.20.080, H WHICH ALLOWS Mayor Pro-Tem FERGUSON, UNILATERALLY, TO CONTINUE THE HEARING.

H. Continuance of Hearing.

1. Any person requesting an administrative hearing or appeal may request a continuance of his/her hearing date, provided, however, that the person requesting the appeal shall be responsible for hearing officer and City staff, consultant and attorney's expenses, if any, incurred as a result of the continuance.

As such, the hearing is cancelled effective upon sending/receiving of this email notification.

Please immediately notify the public that the November 23, 2020, hearing is cancelled.

UNDER THE RULES FOR ADMINISTRATIVE HEARINGS, ATTORNEYS ARE ALLOWED, AND EVIDENCE, WITNESSES, AND CROSS EXAMINATION IS PERMITTED.

THIS IS NOTICE THAT Mayor Pro-Tem FERGUSON WILL BE REPRESENTED BY ATTORNEYS WHO WILL REPRESENT HER IN ALL ASPECTS OF THE ADMINISTRATIVE HEARING

City Attorney Scott Smith indicated the rules for participation by Mayor Pro-Tem Ferguson's attorneys will be decided at the hearing. Again, that is not the rule.

Nothing in the rules for Administrative Hearings denies Mayor Pro-Tem Ferguson the right to have attorneys represent her. And that representation includes Mayor Pro-Tem Ferguson's right to call witnesses, cross-examination, and to offer evidence.

I have represented clients at San Clemente administrative hearings before hearing officers and the client was not required to be present to present his/its case. The City Attorney did not object to that situation.

E. Administrative Hearing Procedures.

...

2. Each party shall have the opportunity to offer testimony and evidence and cross-examine witnesses in support of his or her case.

MR. SMITH INDICATED THE CITY COUNCIL MAJORITY WOULD BE REPRESENTED BY MS. TALLEY (AND HER FEES WILL BE PAID BY THE CITY). MAYRO PRO-TEM FERGUSON DEMANDS EQUAL RIGHTS INCLUDING PAID-FOR LEGAL REPRESENTATION. SHE WILL BE REPRESENTED BY ATTORNEYS OF HER CHOSING AND LIKE THE OTHER COUNCIL MEMBERS, DEMANDS THEY ARE PAID BY THE CITY.

Due Process means if one set of Council members are provided an attorney at the City's expense, Mayor Pro-Tem Ferguson has that same rights and expects and demands her attorneys are paid for by the City. The other council members are being represented by Ms. Talley.

To the extent Ms. Talley can speak before or after public comment, call and examine witnesses, introduce evidence, etc., Mayor Pro-Tem Ferguson's attorneys are required to be afforded the same rights.

BAD FAITH, AND ARBITRARY AND CAPRIOUS ACTION, BY COUNCIL AND CITY ATTORNEY

Below is a list of actions or inactions by the City Council and/or City Attorney that demonstrate the bad faith conduct directed specifically and often intentionally towards Mayor Pro-Tem Ferguson.

1. There is no provision in San Clemente allowing the Council to hold a censure hearing charging Mayor Pro-Tem Ferguson.
2. This is simply a political show trial. If she violated laws, there are remedies other than censure. Civil and criminal actions have not been filed against Mayor Pro-Tem Ferguson.
3. City Attorney Smith and Cristina Talley have refused to recuse themselves, even though they are duty bound to do so.
4. No hearing officer was assigned to the hearing.
5. It is anticipated that City Attorney Scott Smith and the Council majority will limit Mayor Pro-Tem Ferguson's right to counsel.
6. Scott Smith and the Council appear to have created an unfair playing field by stating on the record at the November 17, 2020 hearing, item 9C, that the majority would be afforded (paid for by the City) legal representation of Cristina Talley, but that Mayor Pro-Tem Ferguson can have legal counsel (presumably at her own expense) and then that counsel would be limited as to time as any other member of the public (or that issue can be addressed at the hearing).
7. Whatever rules and time limitation apply to Ms. Talley are the minimum limits on Mayor Pro-Tem Ferguson's chosen counsel.
8. The City has failed to identify and realize that the hearing is required to proceed under the SC Municipal Code "Administrative Hearings." Scott Smith confirmed the November 23, 2020 hearing is an Administrative hearing, thus it follows Administrative Hearing rules apply. See discussion herein.
9. Scott Smith has failed to remain neutral.

10. Mayor Pro-Tem Ferguson suspects the decision to vote to hold a censure hearing was pre-orchestrated and a possible Brown Act violation occurred in pre-Council communications either directly or serially.
11. The discussion and vote on Item 9C to censure Mayor Pro-Tem Ferguson was not included on Item 9C, and thus both the discussion and the vote were illegal and improper under the Brown Act. Yet neither the City Attorney Scott Smith nor attorney Cristina Talley said anything and did not inform the Council that the discussion and vote were not permitted under the Brown Act. This issue is further explained below and in Mr. Winsten's separate cure and correct letter that you have already received or will receive shortly.
12. Cristina Talley was present at the November 17, 2020 hearing and participated in Item 9C. Why? The notification was only the Staff seeking direction on future process and guidance regarding censure. Who did she represent? Why was she present? It appears because the Staff or Council members hired.
13. The City has failed to follow its own administrative hearing rules including failure to have a neutral hearing officer.

1.20.080 - Administrative hearing.

A. Purpose.

It is the purpose and intent of the City Council to afford due process of law to any person who is issued an administrative citation. Due process of law includes adequate notice, an opportunity to participate in a hearing, and an adequate explanation of the reasons justifying the administrative fine.

...

C. Notification of Hearing.

At least 10 working days prior to the date of the hearing, the City shall, by registered or certified mail or personal service, give notice to the person requesting the administrative hearing or appeal of the time, date, and location of the hearing. In the event a person seeks to challenge multiple citations, the City, in its sole discretion, may consolidate all such citation challenges into a single hearing.

D. Hearing Officer.

1. The City Manager shall appoint a person or persons who shall preside at the hearing and hear all facts and testimony presented and deemed appropriate (Hearing Officer).
2. Any person designated to serve as a Hearing Officer is subject to disqualification for bias, prejudice, interest, or for any other reason for which a judge may be disqualified pursuant to Code of Civil Procedure Section 170.1. The offender may challenge the Hearing Officer's impartiality by filing a statement with the City Manager objecting to the hearing before the Hearing Officer and setting forth the grounds for disqualification. The question of disqualification shall be considered and determined in writing by the City Manager within ten days following the date on which the disqualification statement is filed.

E. Administrative Hearing Procedures.

1. The hearing is intended to be informal in nature. Formal rules of the California Evidence Code and discovery shall not apply, except that irrelevant and unduly repetitious evidence may be excluded at the Hearing Officer's discretion.

2. Each party shall have the opportunity to offer testimony and evidence and cross-examine witnesses in support of his or her case.

F. Administrative Order.

1. Within ten (10) working days of the hearing's conclusion, **the Hearing Officer** shall provide the offender with its decision in writing (administrative order). The Hearing Officer shall provide the offender with the administrative order by personal service, or by registered or certified mail to the offender's last known address.

2. The administrative order shall contain the Hearing Officer's findings of fact and conclusions and the procedure described in Section 1.20.090 for seeking judicial review.

3. The issuance of a decision in favor of the offender shall constitute a dismissal of the administrative citation. The city shall return any funds the offender paid to the City towards the dismissed administrative citation.

4. If the Hearing Officer renders a decision in favor of the City, the offender must comply with the administrative order or seek judicial review of the administrative order pursuant to Section 1.20.090.

5. Failure to timely and properly appeal shall be deemed a failure to exhaust administrative remedies and a waiver of the right to appeal.

G. Failure to Attend Administrative Hearing.

1. Waiver of Right to Hearing; Fine and Hearing Fee Immediately Due and Payable. The appellant's failure to appear at a hearing shall constitute a waiver of the right to a hearing, a forfeiture of the hearing fee deposit, as well as a waiver of a right to judicial review of the imposition of the administrative fine pursuant to Section 1.20.090. An appellant's failure to appear at the hearing shall be presumed an admission of guilt to the municipal code violation charges as indicated on the administrative citation. The administrative fine applicable to the administrative citation, and additional hearing fees, if any, shall be immediately due and payable unless an extension is granted pursuant to subsection 2 of this Section 1.20.080.

2. Good Cause. Upon a showing of good cause by the appellant, the Hearing Officer may excuse the appellant's failure to appear at the hearing and reschedule the hearing. Under no circumstances shall the hearing be rescheduled more than one time; provided, however, that if, after the first rescheduled hearing, the appellant pays a deposit in the amount of the administrative fine, or fines, and all applicable hearing fees, the hearing may be rescheduled one additional time. Nothing in this subsection shall be interpreted to mean the appellant is excused from the requirement of paying the administrative fine, hearing fee or fees, or appearing at a hearing.

3. Unless excused for good cause per subparagraph (G)(2) above, an appellant that fails to appear at the hearing, or the rescheduled hearing as proscribed herein, shall be deemed to have failed to exhaust their administrative remedies and a waiver of the right to appeal.

H. Continuance of Hearing.

1. Any person requesting an administrative hearing or appeal may request a continuance of his/her hearing date, provided, however, that the person requesting the appeal shall be responsible for hearing officer and City staff, consultant and attorney's expenses, if any, incurred as a result of the continuance.

2. No more than two continuances of an administrative hearing or appeal shall be granted, unless the City approves a further continuance for good cause, which shall be determined in the sole discretion of the City Manager or his designee. Any person who fails to appear at a hearing, as described in Section 1.20.080.G, shall not be entitled to a continuance as provided herein; such person's relief, if any, from failure to appear, unless excused for good cause per subparagraph (G)(2) above, shall be limited to the provisions set forth in Section 1.20.080.G.2.

3. The City Manager, or his designee, shall have the sole discretion to waive the payment of hearing officer and/or staff expenses incurred by the City as the result of a continued administrative hearing or appeal, in the event the continuance is the result of exigent circumstances, including, but not limited to illness or other unforeseen circumstance.

Constitutional Implications

Ex Post Facto

Ex post facto laws are expressly forbidden by the Constitution in Article 1, Section 9, Clause 3 (with respect to federal laws) and Article 1, Section 10 (with respect to state laws). The City is not permitted to create a law to censure a council member after the acts complained of occurred. That was a basic first year law school lesson.

As of the November 23, 2020 hearing date, the City of San Clemente does not have a law allowing the Council to Censure Mayor Pro-Tem Ferguson. Censure is not defined or even mentioned in the Municipal Code.

AGENDA REPORT 9C states: "The Council has authority to censure an individual Councilmembers. (*Braun v. City of Taft* (1984))..." That case does not consider whether a city can censure a council member in the absence of an ordinance.

Scott Smith was surely aware that according to California Municipal Law Handbook's ("CMLH"), the bible for municipal law attorneys, of the discussion regarding *Braun v. City of Taft*: "There was no discussion of either the nature of the censure action or due process requirements." He had a duty to fully inform the Council that the issue is not settled law, and being a City Attorney with duties to the public and the truth, to take a conservative approach to protecting all side's rights, including Mayor Pro-Tem Ferguson. The overwhelming weight of authority, as well as practice in other municipalities that have considered the question, requires that a written policy complying with due process and fair hearing procedures be adopted notifying all Council members and the public in advance what grounds might justify a censure and the fair procedures required for pursuing a censure proceeding. Instead, he took an aggressive position in favor of one side to the detriment of his client Mayor Pro-Tem Ferguson.

There are several constitutional limits on the City Council's authority to censure members of the City Council that are not accounted for in the Item 9.C. agenda and report.

Limits Under the U.S. Constitution

The United States Constitution provides three broad limitations on a City Council's ability to discipline a fellow council member. First, censure is not an appropriate remedy where doing so would impinge on the First Amendment speech rights of a Council Member. (*Richard v City of Pasadena* (1995) 889 F.Supp. 384.) That is undisputed based on a recent statement by Scott Smith, yet, many of the charges are based on free speech rights. Second, this policy cannot violate the doctrine of "legislative immunity". (*Bogan v. Scott-Harris* (1997) 523 U.S. 44.) Third, the City must afford the person being censored the due process rights of notice and an opportunity to be heard. (*Little v. City of North Miami* (11th Cir. 1986) 805 F.2d 962, 969.) Each of these is discussed below.

First Amendment Free Speech Rights

The City Council cannot legally censure members of the City Council for speech that is protected by the First Amendment. (*Kucinich v. Forbes* (N.D. Ohio 1977) 432 F. Supp. 1101, concluding that a City Council could not suspend a council member for making allegedly defamatory remarks about the council president.) The only appellate level California case which deals with the authority of a City to censure a fellow Council Member is *Braun v. City of Taft* (1984) 154 Cal.App.3d 332. In that case, the Court set aside the Council's censure. If the City adopts a policy which permits censure of City Council members, the City must clearly state **in advance** what conduct will constitute grounds for a censure. Additionally, if the City decides to censure any Council Member, the City should state that it is basing its censure upon inappropriate conduct, rather than speech, to ensure it does not trigger legal challenges on First Amendment grounds.

Legislative Immunity

The City cannot legally censure members of the City Council for purely legislative actions. The United States Supreme Court has recognized absolute immunity for local legislative bodies for legislative actions. (*Bogan, supra*, at 54.) "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." The court will simply look at whether the official was acting in a legislative capacity and if the official was acting in a legislative capacity, then the Council Member is entitled to absolute immunity for this conduct. This immunity only covers the decision itself, the content of the decision, any steps the Council Member took to render that decision and any statements made during a public meeting in which the official made the determination.

Fourteenth Amendment Due Process Rights

The City must provide the accused council member with notice and an opportunity to understand and respond to the criticisms against him or her before imposing discipline. As the court references above note, an important part of proving notice, is having, in place, a policy that clarifies what conduct could lead to censure. The court in *Little, supra*, at 964, concluded that a censure may be considered the deprivation of a property interest and a liberty interest because it involves potential damage to reputation and business interest. As such, if the City deprives a Council Member of this interest without due process this may give rise to a claim for violation of the 14th Amendment to the United States Constitution, and a violation of civil rights under U.S.C.S. §1983. If a Council intends to censure any public official, including a fellow Council

Member, it must provide constitutionally sufficient notice and an opportunity to be heard.

6-day Notice and lack of procedural rights are insufficient

Fairness is the cornerstone of justice. Adequate notice and time to prepare are cornerstones of justice. They are absent here. The hearing cannot proceed as a Kangaroo Court.

For some inexplicable reason, on Tuesday November 17, 2020, the Council voted to set a censure hearing on November 23, 2020. That provides Mayor Pro-Tem Ferguson only 6 day notice of the hearing and far less written notice of the actual charges that she was told would be provided, and still no notice of the moving party's witnesses, evidence, etc.

Proof there was no emergency can be found in the fact that the Council decided long before November not to remove Mayor Pro-Tem Ferguson from her position as Mayor Pro-Tem. After that vote, the Council never set another vote to remove her.

Mayor Pro-Tem Ferguson has the right to prepare fully and, must under due process rights, have sufficient time to prepare. Less than 6 or 4 days is not sufficient. That right includes the ability to call witnesses and to cross examine witnesses. Those rights are provided to "defendants" of administrative hearings in San Clemente, so the rules are well established regarding adequate time for calling witnesses, allowing attorneys to represent the accused, and the ability to cross-examine the City's witnesses.

There is no indication that Mayor Pro-Tem Ferguson's witnesses are available to attend the hearing on Monday November 23, 2020, which falls on Thanksgiving week when many people are unavailable due to family commitments.

Nor was any witness list presented to Mayor Pro-Tem Ferguson by the City. How can she prepare to refute testimony or cross-examine each witness when the City has failed to mention, let alone list, the persons that will be testifying against her.

As of Thursday noon, even the grounds for censure were a mystery. While Kathy Ward listed her "charges" she is only a single Council member. Notice was prepared by the Majority Counsel Cristina Talley.

Mayor Pro-Tem Ferguson was not provided any reason why the setting of a hearing was not properly agenzized after a proper process was adopted, but instead needed to be crammed down and expedited since Ms. Ward and Mr. Hamm have been complaining about her for more than a year since the former Mayor left and as Mayor Pro Tem she succeeded to his duties, with Mr. James joining their bandwagon not much later. More importantly, there is no reason that the hearing cannot be rescheduled until a time when Mayor Pro-Tem and her legal counsel can prepare a defense to the charges.

This email/letter is a demand and request that the City and Cristina Talley, if she fails to recuse herself, delay the hearing to a time when all due process rights can be afforded Mayor Pro-Tem Ferguson.

This email/letter is a demand and request that the City and Scott Smith, if she fails to recuse himself, delay the hearing to a time when all due process rights can be afforded Mayor Pro-Tem Ferguson.

Based on the current COVID-19 restrictions, Mayor Pro-Tem Ferguson and her lawyers request the hearing be delayed until at least February 2021 in order that the City can comply with its obligations set forth in this letter (subject to further delay until public in-person appearances are allowed and required for all testimony).

This demand includes that if a properly noticed hearing is held that includes only appropriate attorneys for the City, that Mayor Pro-Tem Ferguson will be provided the opportunity to see visually the testimony of each witness.

Due Process Violations based on COVID-19:

A fair hearing requires the ability to call witnesses and confront and cross-examine witnesses. Under the current Covid-19 Council restrictions, a fair hearing cannot be held. In the City's current operating procedures, witnesses are not permitted to appear via zoom. Thus, only written testimony or opinions are permitted. Yet those comments/testimony/opinions are not made under oath, a requirement for a censure hearing.

On multiple occasions, Brad Malamud litigated administrative fines in the City of San Clemente. In each occasion, the hearing officer agreed that every witness must be sworn in before he/she could testify. That is standard operating procedure. During those hearings, all witnesses and the attorneys took an oath, and then spoke and/or testified. Since comments were not emailed to the City Clerk, everyone appeared before the tribunal at Old City Hall. The procedure for the City's witnesses can be no less.

Every City witness and the City's Attorney must take an oath to insure their veracity. While public comment is allowed, and critical, and can be considered by the tribunal, witnesses who will present evidence and facts, and discussion of the law, must be held to a higher standard, which may not be possible during the COVID-19 restrictions imposed and maintained by the State, Erik Sund and the City Council.

On this basis, Mayor Pro-Tem Ferguson demands delay of any censure hearing until Mayor Pro-Tem Ferguson and her attorneys, and witnesses can attend the hearing or be viewed by all and be sworn in.

Delay is justified ,and required, to ensure a fair hearing.

If the City disagrees, please provide Mayor Pro-Tem Ferguson and her counsel:

- 1) The reason the hearing must go forward on November 23, 2020
- 2) How witnesses will testify
- 3) How the oath will be taken by witnesses
- 4) How all witnesses will be seen/viewed by Mayor Pro-Tem Ferguson, her lawyers, Council members, the hearing officer, and residents

At the current time, Council meetings, including the November 23, 2020 hearing, restrict public access, in violation of Mayor Pro-Tem Ferguson's right to a fair hearing and to confront her accusers.

The hearing will limit Mayor Pro-Tem Ferguson, and most Council Members, to Zoom attendance. In many cases, some Council members refuse to allow video of them. That would be a violation of due process in this quasi-judicial administrative action. In most prior Council meetings, Council member Hamm has appeared without video.

The law requires the accused to be able to confront a witness and accuser, and have the tribunal present.

Yet the procedures in place do not allow residents to appear on Zoom. Other than Staff and Council and the City Attorney and presumably Cristina Talley, others must submit emails to the City Clerk to be recognized.

A hearing cannot be conducted when Mayor Pro-Tem Ferguson and her attorneys cannot examine witnesses, cross examine witnesses, call witnesses, and see them and the tribunal and/or hearing officer.

Facial expressions, tone, volume, fidgeting, tenseness, relaxation, style, pace, intonation, references to notes or other writings, etc. are all the basis for a judge or jury or trier of fact to evaluate truth as well as the weight of evidence.

That is why witnesses must be present and viewed by the tribunal except in exceptional circumstances. Reading statements by the City Clerk does not allow anyone to evaluate the veracity and genuineness of witnesses, and the weight of evidence.

On this basis, and because there is no stated or actual emergency requiring this expedited hearing, Mayor Pro-Tem Ferguson demands the hearing be delayed until she has the right to see, confront, and call witnesses in the venue in which the hearing will take place.

TIMING AN DATE OF MEETING FAILS DUE PROCESS AND CIVILITY

The hearing was set 6 days after the November 17, 2020 Council meeting. That alone, 6 days, is inadequate time for Mayor Pro-Tem Ferguson and her counsel to prepare for a serious hearing regarding censure.

Even worse, it was not until 4 pm Thursday, that Mayor Pro-Tem Ferguson was provided notice from the City (drafted by Cristina Talley) that describe the charges being brought against her. Thus, the actual time left to prepare for the hearing is just over 4 days. This is not sufficient time to prepare for Mayor Pro-Tem Ferguson's hearing.

The hearing was set for Monday November 23, 2020. Not mentioned, yet critical here, is that this is the week of Thanksgiving. Mayor Pro-Tem Ferguson, her attorneys and or witnesses have travel plans and/or family and/or other obligations to consider and that effect their ability to prepare for or attend the hearing. Such short notice and setting the hearing without consulting Mayor Pro-Tem Ferguson as to her or her attorneys' availability is a due process violation and lack of civility.

Brown Act Violations.

The Ralph M. Brown Act (Government Code §54950 *et seq.*, hereinafter the "Brown Act") governs meetings conducted by city councils. The Brown Act sets forth the legislature's determinations on how local entities are required to balance the public's right of access to meetings and the public entity's need for confidential candor, debate and information gathering. The purpose of the Brown Act is to facilitate public participation in local government decisions and curb misuse of the democratic process by secret legislation of public bodies. (*Cohan v City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.)

Braun v City of Taft (1984) 154 Cal.App.3d 332, 201 Cal.Rptr. 654 is a California case which deals directly with censure of a city council member for behavior outside a meeting. In *Braun*, the Council censured Council Member Braun for publicly releasing allegedly confidential city personnel documents. After being censured, Braun sued, asking the court to declare that the documents at issue were public records. The court agreed and remanded the matter to the City Council with direction to reconsider the censure action because the documents released were not confidential. Braun stands for the principle that legally sufficient grounds must exist in order for a City Council to adopt a resolution of censure.

The California Courts of Appeal have issued two other opinions addressing censure by a city council. See *Scott v McDonnell Douglas Corp.* (1974) 37 Cal.App.3d 277, 112 Cal.Rptr. 609 and *Richard v City of Pasadena* (1995) 889 F.Supp. 384. In *Scott*, a lawsuit was brought by the city manager after a majority of the city council signed a letter criticizing him. The letter was read at a city council meeting and distributed to those in attendance. The court held the letter was one of censure and reprimand, but denied the city manager's claim for relief. The court held that the council's actions were privileged because the letter was read at a council meeting and related to retention of the city manager whose appointment, performance and removal were within the purview of the council. As it relates here, *Scott* stands for the principle that courts usually defer to the free exchange of information as part of the "deliberative process" of a democracy. Mayor Pro-Tem Ferguson was well within her rights to publicly voice her consternation about the former City Managers, the current Interim City Manager, the City Attorney, etc. People in executive positions don't have the same privacy rights as lower level employees. Even if the language used is vehement, caustic, or untrue, so long as the statements bear some connection to the work of the legislative body, council members have immunity from civil or criminal liability for broadly defined "legislative" activities. (See *Bogan v Scott-Harris* (1998) 523 U.S. 44; *San Pedro Hotel, Inc v City of Los Angeles* (1998) 159 F.3d 470.)

The person to be censured is entitled to due process which requires notice and an opportunity to respond that pass constitutional muster. (See *Little v City of North Miami* (1986) 805 F.2d 962 and *Richard v City of Pasadena* (1995) 889 F.Supp. 384.) **The court in *Richard* set aside a censure action and awarded attorney's fees to a council member who was censured for violations of rules of conduct which the court ruled to be vague, overbroad and content based so as to inhibit free speech.** The *Little* case involved a law school professor who sued the City because the council had censured him for improper use of public funds. The professor was assisting, without fee, an environmental group in litigation against the State. The professor was not notified of the pending council action, nor given the opportunity to respond. He claimed a deprivation of a property and liberty interest without due process of law. The court held that he

had stated a cause of action under 42 U.S.C. § 1983 by sufficiently alleging injury to his business reputation.

Notice to City to Cure

This letter is to call your attention to a substantial violation of a central provision of the Ralph M. Brown Act, one which will jeopardize the finality of the action taken by the City Council on November 17, 2020 and that is scheduled to take place on November 23, 2020.

The nature of the violation is as follows: In its meeting of November 17, 2020, the City Council discussed and voted upon issues related to censure of Mayor Pro-Tem Ferguson under the guise and directions contained in Agenda Item and Agenda Report 9C. Nowhere in those documents was there any mention of Mayor Pro-Tem Ferguson, and plan to discuss or vote to hold a hearing to censure Mayor Pro-Tem Ferguson, and therefore any such discussion failed to inform the public of the subject matter, all in violation of the Brown Act.

The action taken was not in compliance with the Brown Act because the Brown Act requires the public (and here Mayor Pro-Tem Ferguson) have notice 72 hours before the Council meeting, of the subject that will be discussed and voted upon. With respect to November 17, 2020 Item 9C, the description was to provide direction to Staff regarding establishing rules and process to censure a City council member. No Council member was mentioned, implicated, or described. No particular violation leading to censure was mentioned or described. No discussion was contained in the Agenda or Agenda Report that Council would discuss or vote to hold a hearing to censure Mayor Pro-Tem Ferguson. Therefore, what occurred during the Council meeting, both discussion and the vote to set a hearing, was and is as a matter of law not permit to be discussed in open session as there was no adequate notice to the public on the posted agenda for the meeting that the matter acted upon would be discussed, and there was no finding of fact made by the Council that urgent action was necessary on a matter unforeseen at the time the agenda was posted.

In the event it appears to you that the conduct of the City Council specified herein did not amount to the taking of action, I call your attention to Section 54952.6, which defines “action taken” for the purposes of the Brown Act expansively, i.e. as “a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.”

As you are aware, the Brown Act creates specific agenda obligations for notifying the public with a “brief description” of each item to be discussed or acted upon, and also creates a legal remedy for illegally taken actions—namely, the judicial invalidation of them upon proper findings of fact and conclusions of law.

Pursuant to that provision (Government Code Section 54960.1), this communication is a demand that the City of San Clemente, through its Council, City Manager and/or City Attorney (or in some other manner) cure and correct the illegally taken action as follows: including but not limited to 1) cancel the November 23, 2020 hearing, 2) find that the discussions and vote on November 17, 2020 on Item 9C violated the Brown Act and therefore will be of no legal

consequence and will be stricken from the minutes other than by reference that the discussion and action taken was a Brown Act violation and therefore is not included in the minutes. In addition, if the decision regarding the Brown Act violation occurs after any hearing to censure Mayor Pro-Tem Ferguson, then demand is made to set aside the decision of the City Council (if the majority votes to censure Mayor Pro-Tem Ferguson) because the predicate vote to the hearing/meeting was a Brown Act violation and therefore the hearing/meeting was not permitted or approved except through a violation of the Brown Act.

As provided by Government Code Section 54960.1, the City has 30 days from the receipt of this demand to either cure or correct the challenged actions or inform Mayor Pro-Tem Ferguson and her attorneys of record of the City's decision not to do so. If the City fails to cure or correct as demanded, such inaction may leave me no recourse but to seek a judicial invalidation of the challenged actions pursuant to Section 54960.1, in which case Mayor Pro-Tem Ferguson will ask the court to order the City to pay Mayor Pro-Tem Ferguson's attorneys' fees, costs, and court costs in this matter, pursuant to Government Code Section 54960.5.

The Discussion and Vote to Set a Hearing to Censure Mayor Pro-Tem Ferguson violated the Brown Act

On November 17, 2020, Council members Hamm, Ward, and James orchestrated a political vendetta against Mayor Pro-Tem Ferguson. It is clear that the action to hold a censure hearing is political as the only grounds listed were either violations of first amendment protected rights or the supposed dissemination of protected confidential documents. To be clear, the first amendment speech issues are not subject to censure. Scott Smith confirmed this in a text message to Mayor Pro-Tem Ferguson on November 17, 2020. The other charges are dissemination of confidential documents. The first was the claim letter from a lawyer for former City Manager James Makshanoff. Before releasing that letter, Mayor Pro-Tem Ferguson asked the JPIA attorney if she legally could release it. That lawyer told Mayor Pro-Tem Ferguson it was a public document and gave her the green light to release. The second document was an allegedly confidential or privilege City voter survey. It was supposedly subject to Deliberative Process Privilege. That is untrue. It in no way qualifies for the deliberative process privilege. The reasons are many, but a few will suffice. First, the information never was provided to Council in the time frame for which it was acquired. The document was never the subject of Council discussion or deliberations. The document was prepared for submission of ballot measures by the City in June 2020. Yet the release wasn't until months later. Finally, there is no reasonable argument that if the public was aware of the results of polling, it would chill any deliberation. In fact, since deliberations are required to be held in public AFTER the document is released, there can never be a chilling effect of the release of a document that must be released before council deliberations or vote. Its release could not "chill" the future vote of the Council, a requirement to assert the Deliberative Process Privilege. That privilege claim is a sham. It violates the duties of the City Attorney not to take frivolous positions, and everyone knows it. The Brown Act confidentiality requirements only apply to what is properly discussed in closed session. (See Register Div. of Freedom Newspapers, Inc. v. County of Orange (1994) 158 Cal.App.3d 893, 906-908.) Since the survey was not properly discussed in closed session, nor could it be, the charge based on that disclosure is legally insufficient under *Braun*. Other charges suffer from the same defect.

On this point, on Tuesday November 17, 2020, Mayor Pro-Tem Ferguson directly asked Erik Sund and Scott Smith if she had ever violated the law regarding document disclosure. That is a straight-forward question. Both refused to answer. They likely refused because if they said yes, the follow-up question would certainly have been which document and what law was violated. Since no law was violated, rather than answering, they simply refused. This failure to answer a straight-forward question demonstrates which side they are on.

Council voted to proceed to a censure hearing against Mayor Pro-Tem Ferguson. Yet, there was no Agenda notification that any action would be taken against Mayor Pro Tem Ferguson which is a clear violation of the Brown Act. In fact, Mayor Pro-Tem Ferguson's name is not mentioned in Agenda Item 9C, even though to discuss or vote on a hearing the notice would have had to specifically name her.

The Item, 9C, was clear and indicated that the Council would consider the PROCESS and GROUNDS available to it for future "Possible Censure of Councilmember(s)." Nothing in the Agenda Item suggested, let alone set-forth, that the Council was even considering a specific action against a single council member. The fact that no Council member's name was cited or used is evidence that Item 9C was exactly what it described; a request by Staff for direction, and nothing more. Yet the City Attorney failed to limit discussion or the vote to the subject matter noticed to the public, which he was duty-bound to do a City Attorney.

The staff recommended:

"Consider process and ground for possible censure of Councilmember(s) and provide direction Council deems appropriate."

The noticed action was for the Council to provide direction on the process and grounds pursuant to which a future action of censure would be permitted in San Clemente. No other action was permitted to be discussed, cited, mentioned, or requested. The public was not notified there would be a vote to set a hearing against a single council member. Nor was Mayor Pro-Tem Ferguson notified the Council would discuss and vote on a hearing to censure her. This not only violated Mayor Pro-Tem Ferguson's due process rights, it also violated the Brown Act.

Instead of a new ordinance or policy on process and grounds for censure, Council Member Ward stated the specific bases for her proposed charges and made a motion for a censure hearing against Mayor Pro-Tem Ferguson.

That issue, censure against specifically Mayor Pro-Tem Ferguson, was not noticed. Clearly, at a minimum, the City Attorney was well aware of the Brown Act violation, but refused or failed to say anything.

The discussion and vote were violations of the Brown Act, and therefore the action taken was a violation of the law and a violation of Mayor Pro-Tem Ferguson's and residents rights to be hear, to comment, and to have at least 72-hour notice of any item before the Council.

Under New Business Item 9C:

Process and Grounds for Possible Censure of Councilmember(s) Pages 9C-1 through 9C-2

Report from the City Attorney concerning process and grounds for possible censure of Councilmember(s).

Staff Recommendation Consider process and grounds for possible censure of Councilmember(s) and provide any direction Council deems appropriate.

That is the complete notice contained on the Agenda Report for November 17, 2020 regarding CENSURE.

Nothing in that notification mentions discussion of a censure action against a Council Member, let alone Mayor Pro-Tem Ferguson. Her name does not appear on the Agenda Item 9C nor on the Agenda Report 9C.

Agenda Report 9C by the City Manager Department, prepared by the City Attorney Scott Smith, must be reviewed to determine the scope of discussion and voting. There could not be a proposed action against Mayor Pro-Tem Ferguson because Scott Smith, the City Attorney, would have been required to recuse himself.

Cristina Talley had already been hired with respect to any possible action of censure against Mayor Pro-Tem Ferguson. Therefore, if that was the purpose of Item 9C, Cristina Talley would have prepared Item 9C Agenda Report. She was specifically retained and invited in advance to bring the censure proceeding against Mayor Pro-Tem Ferguson, before it was ever agendized. Instead, inexplicably, conflicted attorney Scott Smith drafted the Agenda Report and orchestrated these events.

Worse yet, when Mayor Pro-Tem Ferguson asked what her procedural rights were at the November 23, 2020 hearing, Mr. Smith, not Ms. Talley, responded. Those answers tainted whomever actually decides the procedures and due process rights that will and are required to be afforded to Mayor Pro-Tem Ferguson if a censure hearing ever occurs.

Mr. Smith, as they say, poisoned the well. Thus, Mayor Pro-Tem Ferguson's procedural rights at the November 23, 2020 hearing have been irrevocably tainted.

For this reason alone, setting aside that a former BB&K attorney is required to recuse herself, Ms. Talley must recuse herself and a new attorney must be appointed that is not tainted by Mr. Smith's improper and inappropriate post recusal comments.

Mr. Smith, rather than Ms. Talley, inexplicably prepared the Agenda Report. He set forth an outright misstatement of law and fact stating inexplicably that there is a San Clemente Municipal Code that sets-forth the procedures and rules for censure of a council member. This is far more than a mistake or as Mr. Smith described it, a typo. This alone is grounds for setting aside the November 23, 2020 hearing as well as the Council vote, as Council members are deemed to have relied on this misinformation. Agenda Report 9C states:

“The City’s Municipal Code does provide an express process for censures.”

Turns out the SC Municipal Code **does not** directly contain any rules for censure, procedural, process, or otherwise. Scott Smith confirmed the misstatement.

This misstatement is critical. It flies in the face of the reason set-forth for the Agenda Item: to provide direction for Staff to create a process (rules) for any future censure. Instead, Mr. Smith

mislead (intentionally or otherwise) the residents and Council members that the rules already existed for censure hearings (as if rules for censure hearings existed). If that was the case, why was Staff asking for direction.

But this mistake was not accidental. Mr. Smith drafted the Agenda Report or did he? It could have been prepared by one of his attorneys or para-professionals, but then the "Prepared By: Scott Smith, City Attorney" would have been misleading at best.

But going along with the premise that Scott Smith, himself, either prepared the Agenda Report or at a minimum reviewed and approved it, we now know that it was misleading and clearly misstated that the City already had an ordinance: "The City's Municipal Code does provide an express process for censures." Yet it doesn't directly.

Mr. Smith failed to cite the municipal code section he was referencing. If there was such a code, Mr. Smith would have asked for "direction of staff to *modify or update.*" He didn't.

Even then, only one person, the City Manager, initialed the Agenda Report, which by the way was designated the source of the Agenda Report, "Department: City Manager." Oddly, the City Attorney failed to initial the Agenda Report, further clarifying that he prepared and reviewed the report.

Both the City Manager and the City Attorney are barred by conflict of interest and impartiality from involvement and must recuse themselves. Thus, even the above statement and Agenda Report were violations of their recusal and unfair to Mayor Pro-Tem Ferguson.

Yet knowing there are no rules set forth in the SC Municipal Code, Scott Smith either lied, knowingly misstated the law, or failed to notice a "typo." This statement still harmed Mayor Pro-Tem Ferguson. The explanation by Scott Smith of a typo is 1) laughable, 2) nonsense, and 3) a cover-up. He was caught. Mayor Pro-Tem Ferguson awaits a full explanation of this "typo" and how it could and did occur.

Critically here, Scott Smith was unaware, apparently, that all administrative hearings are governed by the SCMC. So while censure is not specified, there are rules in place regarding the process and procedures, and notice for all administrative hearings.

Discussion:

The Brown Act requires notice of all issues that will be discussed and for which any Council vote will be taken. Here, Item 9C was limited to the described activities which relate only to providing guidance to Staff regarding creating an ordinance or rules regarding censuring a Council member and the process thereunder. No mention of actually beginning the process of censuring Mayor Pro-Tem Ferguson was included. MTP Ferguson's name was not included anywhere in the Agenda under Item 9C, nor in the Agenda Report for Item 9C, proving beyond any doubt the item was not a request for discussion and vote on a motion to set a hearing to consider censure of Mayor Pro-Tem Ferguson. The discussion and vote (3-1) at the November 17, 2020 Council meeting was barred by Brown Act notice requirements. The discussions and action to move forward to a hearing are null and void and if the Council desires to proceed to a hearing charging censure against Mayor Pro-Tem Ferguson, the discussion and vote must be re-noticed.

Participation in the November 17, 2020 Council meeting Agenda Item 9C, and drafting of the Agenda Report by City Attorney Scott Smith were improper and proved he was a willing participant to the censure movement in violation of conflict of interest and State Bar Rules of Professional Conduct restrictions.

Comments after the November 17, 2020 hearing by City Attorney Scott Smith regarding rules and procedures that might apply to the censure hearing against Mayor Pro-Tem Ferguson prove that the Municipal Code does not contain procedures for censure. (see later discussion).

The City Attorney should have remained silent during the Agenda Item 9C, as Cristina Talley was hired as the Acting City Attorney with respect to the Agenda Item which stated it was request of the Council for direction in drafting or developing rules and procedures for censuring another council member. Scott Smith recused himself by bringing in Ms. Talley, but then interjected his thoughts regarding assistance of counsel and rules specific to the charges against Mayor Pro-Tem Ferguson regarding witnesses and cross-examination, after the discussion veered away from the noticed agenda item topics, something he knew he was not permitted to do, period, but did it anyway. At that point, his obligation was to advise all concerned that they were deviating from the noticed agenda topic and to explain what was permissible, and not permissible, and get the discussion back on track. Instead, he encouraged the Brown Act violation.

The Agenda description of Item 9C, and Agenda Report for item 9C, did not provide Brown Act required notice to both the public and to Mayor Pro-Tem Ferguson of the intent to discuss and vote to set a hearing to censure Mayor Pro-Tem Ferguson.

The Agenda and the Agenda Report limited Item 9C to: Directing Staff to Establishing a Procedure for Future Censure hearings and Grounds for Future Censure Hearings; nothing more.

Any discussion, vote, or future action to censure a specific Council member, the reading of charges, or to schedule a censure hearing against a specific Council member was beyond the scope of notification of the agenda item and thus is barred and the actions and discussion are null and void under the Brown Act, and need to be retracted.

Required Agenda Content

Under applicable California law the Council can only discuss, and take action on, subjects that are clearly described in the Agenda so that the public and Mayor Pro-Tem Ferguson were on notice and had the opportunity to prepare for, and speak at, the meeting.

Agenda Item 9C was limited to direct the Staff to create a policy and procedure or process for a Council member's censure and to formulate grounds for a potential censure of a city council member. Item 9C did not describe any other topic. The Agenda did not describe any existing City Ordinance or the desire to edit or modify any existing Ordinance. Item 9C did not mention discussing or voting the set a hearing to censure Mayor Pro-Tem Ferguson. Mayor Pro-Tem Ferguson's name was not mentioned in Item 9C. Nor was there any discussion of a hearing. Nor was there any mention of discussing any act by any council member to read charges and schedule a hearing against any specific council member.

City Attorney Misinformation and Cover-up:

The Agenda Report (not relevant to notice) that the Municipal Code contains an express process for censure was false.

When asked about it Tuesday night after the hearing, City Attorney Scott Smith fabricated a response that there is no such Ordinance and that the reference was a “typo.” The statement was not a typo. ”Ordinance” is a typo. Citing a law that doesn’t exist is not a typo.

Websters defines typo as:

Definition of typo: an error (as of spelling) in typed or typeset material

Misstatements of fact or law are not a spelling error. Scott Smith’s obvious decision to side with Council members seeking censure requires his disqualification. The “typo” defense provides an extraordinary level of proof that Scott Smith is not objective and has gone, and will continue to go, to great lengths to influence those against Mayor Pro-Tem Ferguson and will lie and/or obfuscate when he is caught in lies or making mistakes. As stated herein, for this reason alone, Scott Smith must recuse himself. He is not impartial.

The California Municipal Law Handbook (“CMLH”), the bible for City Attorneys, states that the agenda must describe with specificity every item to be discussed and voted upon. This is an easy task. Item 9C did not describe discussing or voting to hold a hearing to censure Mayor Pro-Tem Ferguson.

The CMLH states:

“The agenda must specify ... a ‘brief general description’ of each item of business to be transacted or discussed.” CMLH Section 2.20.

“However, agenda descriptions should give enough information to permit a person to make an informed decision about whether they want to attend or participate in a discussion on an issue.” CMLH Section 2.20.

“PRACTICE TIP: ... Each distinct formal action connected with a particular item of business should be listed ... regardless of the length of the overall listing.” CMLH Section 2.20.

“Agendas must also describe each distinct action to be taken by the legislative body.” CMLH Section 2.20.

Each action to be taken by Council must be described so that **every resident** can decide whether to participate and can prepare for that participation.

When Mayor Pro-Tem Ferguson brought up the fact that the agenda item was for discussion of a process only, she was interrupted and her plea was ignored the City Attorney who had a duty to advice the Council she was right and to explain the permissible bounds of the agenda item.

NOWHERE is there a description in Agenda Item 9C that any action for censure, or to set a hearing to censure anyone, including Mayor Pro-Tem Ferguson, would be heard by the Council.

Because there was no notice of a discussion, action, or vote to set a hearing to censure Mayor Pro-Tem Ferguson, the discussion and vote violated the Brown Act.

Based thereon, any action to set a hearing or a hearing date to censure Mayor Pro-Tem Ferguson was a Brown Act violation.

The remedy requested by Mayor Pro-Tem Ferguson is to set the decision aside, indicate in the minutes that the item was retracted due to a Brown Act violation, and to re-notice the discussion and vote on creating a policy and procedure if that is what the Council majority still wants to do. See discussion on cure, herein.

The public was uninformed, uninvolved, and Mayor Pro-Tem Ferguson was unaware that Item 9C included in its scope a discussion and a vote regarding her own censure.

Further clarification is provided in CMLH Section 2.23:

“Subject to certain exceptions, no action or discussion may occur on any item not appearing on the posted agenda.” Govt C Section 54954.2(a)(3).”

None of the listed exceptions apply to the discussion or vote to set a hearing to censuring Mayor Pro-Tem Ferguson.

The discussions and vote were improper and illegal under the Brown Act and must be set-aside immediately. The hearing is unauthorized (legally) and cannot proceed.

There is no Ordinance that Allows the Council to Censure one of its Members:

On this basis alone, no action or hearing can proceed regarding censure of Mayor Pro-Tem Ferguson. As stated above, the hearing and censure charges are illegal because there is no Municipal Code Ordinance regarding censure of a City Council member. It was precisely this lack of an ordinance that was the basis for the Agenda item. The agenda item stated “Staff” was requesting direction to create rules/procedures and grounds for censure. Really? Isn’t that the sole province of the City Council? In America, we don’t punish anyone for a law or with penalties that didn’t exist at the time the act occurred. It is no different with censure. Even if the Mayor Pro-Tem did everything she will be accused of in the notice and at the hearing, which she did not, that is not enough for the Council to censure her because none of those were announced to be grounds for censure at the time the acts were performed. The City did have a very robust ethics and censure policy for many years. It was repealed by the 2017 City Council because they were tired of being the target of well-founded accusations and sought to protect themselves from the very type of action the current council is now engaging in. Perhaps that repeal itself ought to be repealed?

Because at the time Mayor Pro-Tem Ferguson performed the acts complained of there was no law regarding censure of a Council member, a censure hearing is not permitted. Constitutional Ex Post Facto protection applies to shield Mayor Pro-Tem Ferguson from accusations or a hearing.

If a Hearing is Held, Mayor Pro-Tem Ferguson Must be Afforded Due Process

It is critical that the due process rights must be set in stone prior to the vote to censure. It is not up to the hearing officer or Council members to set those rules on the day of the hearing.

Due process is fundamental to freedom and any hearing. The "accused" has the rights to a fair hearing. In this case, the Censure hearing is not, as City Attorney Scott Smith stated on November 17, 2020, just a normal hearing of the Council.

Instead, Censure presents a quasi-judicial hearing. There is a complaining party or parties, in this case the Council majority, there is in essence a prosecutor, be it Scott Smith or Cristina Talley. There is a jury, the same City Council members who are the complaining witnesses. There is evidence and there are witnesses. There is a right for Mayor Pro-Tem Ferguson to be represented by Counsel of her choosing. There is a right to a fair and impartial hearing. Impartiality is difficult when a majority of the Council members voted to set a hearing (which presupposes there are grounds for censure.) In this case, Kathy Ward read off a long list of violations that are the basis for her motion to set a hearing date to censure Mayor Pro-Tem Ferguson.

Yet while a council member must be open to all views at a normal council meeting, there is no such pretext in a censure hearing. A majority of Council members voted to hold the hearing after Kathy Ward's extended presentation. Then Kathy Ward explained to the Council that this was not a hearing, and therefore Mayor Pro-Tem Ferguson had not right to respond to the allegations. Such a statement was untrue and did not reflect the law (if Kathy Ward had the right to raise the issue in the first place, which she did not have). But once raised, at a minimum one of the two City Attorneys present should have either found that Kathy Ward's action were a Brown Act violation, or that if it wasn't a Brown Act violation that Mayor Pro-Tem Ferguson had the right to respond. Neither interjected those thoughts, even though they were duty-bound to do so as City Attorneys.

Censure is nothing more than a political act. But the results of a censure are most impactful on the Council member being censured. The hearing is not a normal Council meeting. There is no staff agenda report on the merits. There is no discussion of pros and cons. This is a unique hearing that pits one council member against the others. This is a special meeting called on a special day (Monday) and no other items are on the agenda.

Because there is no San Clemente Ordinance regarding censure of a Council member there is no procedure set in stone. In order to determine due process rights at the censure hearing, it is critical and meaningful to reference the San Clemente Municipal Code to determine the minimum and actual due process rights allowed and afforded in similar hearings. As the law of San Clemente, similar ordinances are a reflection of the Council's decision of what rights are afforded to those opposing the City. The best starting point is how the City conducts Administrative Hearings.

At a minimum, without conceding any of defects in this entire matter, far more due process rights must be afforded to Mayor Pro-Tem Ferguson. The due process rights applicable to Administrative Hearings in San Clemente are the minimum that must be afforded to Mayor Pro-Tem Ferguson.

At a minimum, Mayor Pro-Tem Ferguson and her attorneys are permitted to call witnesses, offer evidence, and cross-examine the City's witnesses. See SCMC Administrative Hearings.

Municipal Code Section 1.20.080 "Administrative Hearing."

A. Purpose.

It is the purpose and intent of the City Council to afford due process of law to any person who is issued an administrative citation. Due process of law includes adequate notice, an opportunity to participate in a hearing, and an adequate explanation of the reasons justifying the administrative fine.

B. Request for Hearing.

Any person desiring to challenge the issuance of an administrative citation shall, within ten (10) working days from the date the administrative citation is issued, make a written request for a hearing with the City Clerk setting forth the basis of the challenge.

C. Notification of Hearing.

At least 10 working days prior to the date of the hearing, the City shall, by registered or certified mail or personal service, give notice to the person requesting the administrative hearing or appeal of the time, date, and location of the hearing. In the event a person seeks to challenge multiple citations, the City, in its sole discretion, may consolidate all such citation challenges into a single hearing.

D. Hearing Officer.

1. The City Manager shall appoint a person or persons who shall preside at the hearing and hear all facts and testimony presented and deemed appropriate (Hearing Officer).

2. Any person designated to serve as a Hearing Officer is subject to disqualification for bias, prejudice, interest, or for any other reason for which a judge may be disqualified pursuant to Code of Civil Procedure Section 170.1. The offender may challenge the Hearing Officer's impartiality by filing a statement with the City Manager objecting to the hearing before the Hearing Officer and setting forth the grounds for disqualification. The question of disqualification shall be considered and determined in writing by the City Manager within ten days following the date on which the disqualification statement is filed.

E. Administrative Hearing Procedures.

1. The hearing is intended to be informal in nature. Formal rules of the California Evidence Code and discovery shall not apply, except that irrelevant and unduly repetitious evidence may be excluded at the Hearing Officer's discretion.

2. Each party shall have the opportunity to offer testimony and evidence and cross-examine witnesses in support of his or her case.

A lot of critical due process rights are described above and underlined for emphasis. In any event, Mayor Pro-Tem Ferguson requests and demands that the City and the City Council and/or hearing officer provide her the minimal due process rights set-forth above for Administrative Hearings as more fully described below.

1. Ten (10) day notice is required.
 - a. Here, only at most 5 days was provided, a clear violation of due process right to have sufficient time to prepare for a hearing. There was no finding that an emergency, or other facts required a hearing to be set on such short notice. Even administrative hearings are required to provide at least 10 days' notice to the applicant.
2. Cristina Talley and Scott Smith are disqualified from any hearing or taking any position adverse to Mayor Pro-Tem Ferguson (and must voluntarily recuse themselves): Cristina Talley and Scott Smith and current and former BB&K attorneys must disqualify herself/himself based on CCP 170.1, City Conflict of Interest Rules, and State Bar Rules that apply to all officials and/or attorneys (and city attorneys are City officials).
 - i. No lesser standard should apply here. The rules of judicial disqualification are the standard set-forth in the Municipal Code.
 - ii. Section 170.1(a)(B)(1) states clearly that a judge is disqualified if :
"A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law."
 1. Here, the City was a client of BB&K, and of Cristina Talley who has represented the City (and hence the Council) on at least one past occasion, and likely many more.
 2. Thus, under the City hearing rules, Ms. Talley is REQUIRED to recuse herself from this hearing.

Scott Smith is the long-term City Attorney. He has information that might adversely affect Mayor Pro-Tem Ferguson and which may have been obtained pursuant and under attorney client privilege which Mayor Pro-Tem Ferguson has not, and will not, waive. Mr. Smith is also a witness which is further grounds for his disqualification.

Given his long-term role as City Attorney, Scott Smith, and therefore BB&K attorney (former and present) is not permitted to be involved and to take positions adverse to Mayor Pro-Tem Ferguson. See State Bar Rules, Conflict of Interest Rules, and rules for Judges (applicable at all administrative hearings) regarding recusal.

Cristina Talley has served as a Deputy City Attorney in San Clemente. See, for example, August 3, 2016 Minutes of the Planning Commission⁷ which listed her as the deputy city attorney. While discovery of Cristina Talley's relationship with Mayor Pro-Tem Ferguson and

⁷ <https://www.san-clemente.org/Home/ShowDocument?id=30121>

the City is ongoing, it appears Cristina Talley not only served as Deputy City Attorney while practicing law at BB&K, but since leaving BB&K, has been hired by the City for other assignments including assignments in which Ms. Talley worked directly and indirectly with Council Member Ferguson.

Bottom line: Scott Smith, Cristina Talley, and any former and current BB&K attorney must recuse themselves from any hearing or discussion regarding censure of Mayor Pro-Tem Ferguson.

This letter is a formal request that Cristina Talley and Scott Smith recuse/disqualify herself/himself.

In addition, this is a request to Interim City Manager Erik Sund, to disqualify Cristina Talley and Scott Smith and appoint truly neutral independent attorneys in their place.

At a minimum, Mayor Pro-Tem Ferguson demands due process including:

1. Having attorneys represent her
2. Having witnesses on her behalf
3. Cross examining witnesses
4. Having an opening and closing statement
5. Recusal of Cristina Talley and Scott Smith
6. That no hearing occurs until a valid Agenda Item informing her the Council will vote to set a censure hearing date results in approving a censure hearing
7. That she is provided at least 10 business days to prepare for any hearing
8. That Kathy Ward, Chris Hamm, Gene James, Scott Smith and Eric Sund will, without the need for a subpoena, be made available as witnesses, live and in full view of Zoom Cameras so that they can be seen by Mayor Pro-Tem Ferguson and the other Council members and the public.
9. That Mayor Pro-Tem Ferguson and her attorneys will be allowed to examine witnesses including but not limited to Kathy Ward, Chris Hamm, Gene James, Scott Smith and Eric Sund and there will be no attempt to limit the questioning of these witnesses
10. That Mayor Pro-Tem Ferguson and her attorneys are permitted to call witnesses without limitation
11. That Mayor Pro-Tem Ferguson and her attorneys are permitted to cross examine City witnesses and in particular those witnesses that provide evidence of any grounds for censure
12. That Mayor Pro-Tem Ferguson and her attorneys be given at least 10 minutes for opening and closing statements (and the City go first and be allowed the same amount of time – and if the City desires more time, then the City so informs Mayor Pro-Tem Ferguson and her attorneys and Mayor Pro-Tem Ferguson will not object so long as Mayor Pro-Tem Ferguson and her attorneys are given the same amount of time)
13. Public comments will be allowed.
14. That the City will post a zoom url that can be accessed by witnesses and the public so that all testimony by those who want to appear can be made on camera via zoom.

15. That all Council members, the City Manager, all attorneys representing the City, and any other critical City Staff are displayed (facial view with audio) at all times during the hearing
16. That the "City Attorney" for the hearing be designated at least 72 hours before the hearing (and provided to Mayor Pro-Tem Ferguson) and that person/attorney not be tainted, not have represented the City in the past in any capacity, not be a City Attorney or a former City Attorney, not be a member of a municipal law firm (those firms that regularly represent a City or governmental agency), and not be a former City Manager.
17. That a video record of the hearing, including but not limited to YOUTUBE be live and retained by the City or YOUTUBE for at least 2 years
18. Having a hearing officer
19. Following all procedures for administrative hearings as set-forth in the SC Municipal Code.

All of the above requirements apply regardless of when any future hearing(s) occur. Mayor Pro-Tem Ferguson has stated that it is illegal and improper to hold a censure hearing on November 23, 2020. Because the Brown Act was violated, the hearing must be cancelled until the Council agendaizes and implements a proper policy and procedure before pursuing any notice of its intent to bring censure charges against Mayor Pro-Tem Ferguson.

Neither the Council, nor the residents, not knowing that Kathy Ward and other Council members would single out Mayor Pro-Tem Ferguson, were given proper notice and informed that they had an absolute right to comment on the actions to move forward against Mayor Pro-Tem Ferguson.

That right of comment is critical to notification requirements under the Brown Act.

Based on the Brown Act violations, the City is required to cancel the hearing on November 23, 2020, and if the Council wants to move forward with a censure hearing of Mayor Pro-Tem Ferguson, a future Agenda must set-forth notice to the public (and Mayor Pro-Tem Ferguson) that the Council will be discussing an action to censure Mayor Pro-Tem Ferguson, who reserves all defenses.

This letter is a formal request that Ms. Talley and Mr. Smith recuse/disqualify herself and himself

This letter is a formal request that the acting City Attorney is a neutral and not a member of BB&K, another municipal law firm, not a former city manager, not a former city attorney, and has not been hired by the City of San Clemente in the past

Mayor Pro-Tem Ferguson requests Interim City Manager Erik Sund disqualify Cristina Talley and Scott Smith if they fail to do so themselves. See above.

Because in general a recusal/disqualification decision requires a ten-day notice period, the setting of the hearing before the expiration of that period is a violation of due process.

Both Mr. Smith and Ms. Talley have served the City and the City Council as Deputy City Attorney and/or City attorney within the past 5 years.

State Bar Rules of Professional Conduct, City Conflict of Interest rules which apply to City Officials including City Attorneys, and judicial rules of recusal (applicable to San Clemente administrative hearings) all require disqualification and recusal of all current and former BB&K attorneys and specifically to Mr. Smith and Ms. Talley. It appears their involvement violates the above rules, which have many consequences, a discussion of which is beyond the scope of this email/letter.

First, Mr. Smith has personal information regarding his client Mayor Pro-Tem Ferguson. Ms. Talley has the "taint" as she served under City Attorney Smith during her tenure at BB&K and serviced both as Deputy City Attorney but also represented Mayor Pro-Tem Ferguson and Ms. Talley continues to obtain legal assignments in San Clemente.

Because CCP Section 170.1 establishes that judges must disqualify themselves if they formerly represented the client/party, and that rule applies to administrative hearings in San Clemente, the same rule applies here. Surely a Council member is afforded the same or greater rights than someone at an administrative hearing.

Second, the hearing must afford Mayor Pro-Tem Ferguson the right to call and cross exam witnesses, a right afforded to administrative hearing defendants.

Third, the hearing notice must provide Mayor Pro-Tem Ferguson sufficient time to prepare her defense; at least 10 business days.

Fourth, at the present time, there is no law allowing the Council to censure one of its members. (Ex Post Facto violation).

Fifth, Scott Smith admits: "Your first amendment rights cannot be abridged by a censure action for sure. I'll get you my thoughts on the rest of these questions by email. They deserve good thought and attention."

Recusal and Disqualification:

Scott Smith is required to recuse himself as he is disqualified under State Bar Rules of Professional Conduct and City Conflict of Interest laws. For years, he has represented or obtained knowledge regarding Mayor Pro-Tem Ferguson both in her capacity as a City of San Clemente employee and during her services as Council member and Mayor Pro-Tem.

Recusal is required as Cristina Talley is not a neutral. She has been employed by BB&K in the recent past and was Deputy City Attorney in San Clemente. In her capacity as an attorney for the City of San Clemente, she has worked directly with Council member Ferguson. Her conflict of interest is clear, apparent, and requires recusal and disqualification.

Quoting from Cristina Talley's website Talleylawyers.com:

Cristina joined Best Best & Krieger where she was of-counsel for five years. During that time, Cristina was appointed as the Interim City Attorney for the cities of Riverside and Merced, while handling litigation for several of the firm's municipal clients.

Fact: Ms. Talley was tantamount to a partner, serving as “Of-Counsel” for five years. It is clear that BB&K attorneys and San Clemente City Attorney Scott Smith is required, along with his partners, to recuse himself. The same rule applies to former “of-counsel.”

On November 17, 2020, Mayor Pro-Tem Ferguson requested that Ms. Talley recuse herself. She defiantly refused to do so, providing an excuse that she had left BB&K two years ago. She failed to consider or at least failed to mention that she served as Deputy City Attorney and after her service at BB&K was hired by the City of San Clemente and in that capacity worked directly with Mayor Pro-Tem Ferguson.

There is no valid basis for Cristina Talley to refuse recusal. Conflict of interests do not end in two years as Ms. Talley appears to suggest. She is painted with the same brush as BB&K current attorneys including Mr. Smith. She avoided even discussing her activities since leaving BB&K. Those activities, alone, require recusal.

The standard applicable to recusal includes the appearance of impropriety and the failure to avoid the appearance of impartiality.

For both Scott Smith and Cristina Talley, at a minimum, recusal is necessary based on appearance of impropriety. More to the point, one or more of the charges include denigration and other actions by Mayor Pro-Tem Ferguson directed to Scott Smith, a BB&K partner where Ms. Talley worked for over 5 years. That means Scott Smith is both an alleged victim and witness. As a victim and witness on even one charge, recusal is a forgone requirement.

Based on all the above, both Scott Smith and Cristina Talley are required to recuse themselves and are disqualified from any involvement in a hearing regarding censuring Mayor Pro-Tem Ferguson.

Denial of Procedural Due Process Rights:

Scott Smith stated that Mayor Pro-Tem Ferguson would only be provided minimal rights allowed under California law. That was not his decision to make, and more importantly, he was required to recuse himself from any discussion of her censure. He was apparently unaware of procedures set-forth in the SC Municipal Code for Administrative Hearings.

Procedural rights should be set-forth in San Clemente ordinances so that Mayor Pro-Tem Ferguson has advanced notice of the rules that will apply during her hearing, rather than determine those rules at the hearing, when it is too late to appeal or prepare for the hearing in light of existing limitations. Mayor Pro-Tem Ferguson’s attorneys are unable to prepare because they have no notice of the moving party’s witnesses and evidence, which in turn means they cannot gather evidence and confirm their ability to call witnesses, cross examine witness, make opening and closing statements, etc.

It was not his place to state or even suggest the procedural rights of Mayor Pro-Tem Ferguson should be set at the lowest possible level.

Another California City approved clear due process and procedural rules of the council member facing censure:

At the censure hearing, the Councilmember who is the subject of the request for censure shall be given the opportunity to **make an opening and a closing statement, to call witnesses on his or her behalf and to question his or her accusers.** The subject Councilmember may be **represented by a person or persons of his or her choice whether or not an attorney at law and may have that representative speak or question witnesses on his or her behalf. ...**

Testimony shall be taken only from witnesses having direct knowledge of facts or circumstances relevant to the specific charges under consideration.

This sounds a lot like the SCMC regarding Administrative Hearings. It also shows that if a City wants to censure a council member, it can draft an ordinance.

Most of the cities or municipalities with censure procedures adopted similar robust procedures. The same or similar rules should apply to the hearing.

1. Mayor Pro-Tem Ferguson must be allowed an opening and closing statement of any length.
2. Mayor Pro-Tem Ferguson must be allowed to call witnesses on her behalf.
3. Mayor Pro-Tem Ferguson must be allowed to cross-exam (question) her accusers.
4. MPOT Ferguson must be allowed to be represented in each of the above by a representative and/or attorney(s).

REQUEST AND DEMAND FOR INFORMATION REGARDING HEARING

This email/letter is drafted before Mayor Pro-Tem Ferguson has been sent the City's notice of the censure hearing. As such, it is important to prepare Mayor Pro-Tem Ferguson's defense. Mayor Pro-Tem Ferguson has the right under due process to the following information which must be provided in time for her attorneys and for Mayor Pro-Tem Ferguson to prepare for the November 23, 2020 censure hearing.

1. All San Clemente Law and Procedure that govern or control censure of a Council Member

2. All San Clemente Law and Procedure that govern and control a hearing to charges that Mayor Pro-Tem Ferguson should be censured
3. Any other laws that apply to items 1 and 2
4. A full description of any communications, text, email, letter, phone call or meetings, etc. between any members of Council and Cristina Talley and of Scott Smith regarding censure of Mayor Pro-Tem Ferguson including but not limited to the dates and length of each meeting, the participants at each meeting, the details of the discussion at each such meeting (which is critical to determine whether there was a Brown Act violation if three Council members were present or if a serial (Spoke and Hub) meeting occurred
5. A full description of every communication, email, text, phone call, letter, or meeting between Erik Sund and Kathy Ward, Gene James, and/or Chris Hamm in which any discussion or comments were made regarding censuring Mayor Pro-Tem Ferguson including but not limited to the dates and length of each meeting, the participants at each meeting, the details of the discussion at each such meeting (which is critical to determine whether there was a Brown Act violation if three Council members were present or if a serial (Spoke and Hub) meeting occurred
6. A list of the moving parties' witnesses
7. A list and copies of all documentary exhibits that will be presented at the hearing
8. A list of any and all evidentiary information relevant to this proceeding, including copies of all exculpatory evidence
9. A list of any experts that will be examined or that will testify on behalf of the City
10. A clear discussion, at least 72 hours before the hearing, of the roles, of the roles, responsibilities, and the party or parties represented by Cristina Talley and Scott Smith, and any other attorney that will be present in any capacity on behalf of the City, the City Council, any Council member other than Mayor Pro-Tem Ferguson, and any Staff member including but not limited to the City Manager Erik Sund
11. The reason that Cristina Talley and Scott Smith are not required to recuse themselves
12. Whether the City will be indemnifying and paying the legal fees of Mayor Pro-Tem Ferguson, and if not, an explanation why not?
13. The insurance policy and the identity of any insurance coverage that might cover Mayor Pro-Tem Ferguson's defense to the charges of censure
14. That for each charge that is the basis for censure, all documents related to each such charge, proof or evidence of the facts which support or refute each such charge. For example, if it is alleged that Mayor Pro-Tem Ferguson illegally distributed a confidential documents, the evidence and/or proof that 1) the document identity, 2) who the document was distributed to, 3) the nature of the confidentiality, 4) the basis of the conclusion that Mayor Pro-Tem Ferguson violated the confidentiality law, 5) the specific law that was violated, and 6) where in that law there is a remedy of censure.

DEMAND FOR INDEMNIFICATION AND PAYMENT OF ATTORNEYS' FEES

Under various legal theories including but not limited to the Government Code, Mayor Pro-Tem Ferguson demands that the City of San Clemente pay, reimburse and/or indemnify her for all legal fees she has and will incur in defending herself from the City Council's censure motion and hearing.

This demand is timely and is made at the first possible opportunity.

The action of censure is a direct attack upon Mayor Pro-Tem Ferguson and appears to be a tort action. Mayor Pro-Tem Ferguson is a City employee.

Besides any other basis for indemnification including attorneys' fees, Mayor Pro-Tem Ferguson cites Government Code Section 825, *et seq.*

This request is also based on providing the same rights that are being afforded to the Council majority; legal counsel. In that case, Cristina Talley, Esq. is being paid 100% by the City to represent the majority Council members. Mayor Pro-Tem Ferguson demands the same.

As of the drafting of this letter, substantial legal time has been incurred in meeting with Mayor Pro-Tem Ferguson, as well as legal research, drafting this letter, drafting a separate Brown Act Cure letter, and beginning the defense of the censure charges.

Mayor Pro-Tem Ferguson also requests full insurance coverage to the extent that any insurance policy that protects City employees and specifically members of the City Council covers her defense of this action. Please forward this letter and demand to any insurance company that has a duty to defend and/or indemnify Mayor Pro-Tem Ferguson.

This letter is a tender of her defense of this action to the insurance carrier and Mayor Pro-Tem Ferguson demands that the City tenders this claim for defense and indemnity on her behalf and provides her the details on every City insurance policy or entity that may be liable to indemnify and provide her legal counsel (duty to defend) her regarding the censure hearing on November 23, 2020 or any future hearing or Council meeting regarding this subject.

Mayor Pro-Tem Ferguson has engaged other attorneys for this matter who will provide her a defense. Each counsel will seek payment from the City at a billing rate of \$550 per hour. Each counsel will also seek payment for out-of-pocket expenses.

The City is notice that Mayor Pro-Tem Ferguson's request to tender this defense and for the City, pursuant to the Government Code, common law, and equity, will seek indemnity and defense costs related in any way to her legal bills related to the City Council's November 17, 2020 Item 9C, as well as any issues related to the discussions and upcoming hearing to censure her, presently set for November 23, 2020.

Censure is a Political Act

The merits of censure against Mayor Pro-Tem Ferguson is not the subject of this email/letter. But it is important to explain that there does not appear to have been a single censure of a Council member in the past 30 years, and possibly in the history of San Clemente.

It is clear that Kathy Ward had assistance in her diatribe regarding violations that were made by Mayor Pro-Tem Ferguson. The list seemed to last forever. Three votes were made to move forward on a hearing that was not noticed in advance. This raises the issue of whether preparation of Kathy Ward's list and discussion regarding the vote violated the Brown Act open meeting laws.

In any event, censure does have consequences. It results in tremendous emotional distress for those charged. It results in future concerns regarding job opportunities, harassment, public dishonor, and similar concerns.

It is interesting to note that the hearing was set approximately one week before 2 new Council members are added to Council. The current members had to call a special meeting, on 6 day notice, to make sure they, not the new Council, could castigate, dress down, scold, chastise, and in their minds vote to censure Mayor Pro-Tem Ferguson.

Why did they wait so long? Why did they wait until the first meeting after the November 3, 2020, general election? Once Ward and Hamm turned James to their side of the aisle, why didn't they seek to reorganize the Council and remove Mayor Pro-Tem Ferguson as Mayor Pro-Tem and Acting Mayor? Why did these Council members decide not to allow the new Council to make the decision? How involved were Staff members and the City Attorney? Why did the three Council members, who for the last year or so almost always vote as a block, decide to attack the lone wolf? What are they afraid of?

Was this an attempt to tell the public, if you do not support our position, you will be punished? I think that accurately describes what is going on here. The public is being told if you want to run for office and you don't agree with us, this will also happen to you. These Council members apparently don't want transparency or dissent. They are taking a page out of Alinsky's playbook. They apparently want to silence opposition through public rebuke and humiliation. It is not enough to merely express their disagreement with the positions of those they oppose. No, that is called class. Instead, they resort to personal attacks directly and through acolytes. When that is not successful, they have decided to move to public humiliation via a special session hearing to censure a fellow Council member.

While politics is politics, in over 30 years, the City Council has not censured any Council member. It is likely that censure has never occurred since the City was formed. Who decided to bring this action in the first place? Was it Kathy Ward? Was it Gene James? Was it Chris Hamm? Was it Erik Sund? Was it James Makshanoff? Was it Scott Smith? This is not an accusation against anyone, but somebody, or a group of somebodies, decided and followed through on voting to have a hearing to censure Mayor Pro-Tem Ferguson.

It is hard to believe this was orchestrated, legally, given the Brown Act's limitation on serial meetings. Does anyone believe that two members of the Council, alone, as is required, discussed the issue of censure and then after the election, voted knowing there were three votes for

censure? As Kathy Ward pointed out on November 17, 2020, this is not the time to discuss the acts that are the basis of the desire to censure Mayor Pro-Tem Ferguson. It is clear the die had already been cast and set. Three votes were assured on a matter that was not even noticed. The Brown Act was violated.

While this “proof” of Brown Act violation is inferential, and correlation is not causation, life is simple in San Clemente. Occam’s Razor postulates that the simplest explanation is the right explanation. So it is here. Occam got it right. A group got together and came up with a plan to censure Mayor Pro-Tem Ferguson. The coup attempt was hatched, in violation of the Brown Act and more importantly in violation of common sense and civility. Let’s all get along has been the chorus in San Clemente. Yet those singing the song have proven the words are just that, words, not deeds nor actions.

The political fix was and is in. If you cross Ward, Hamm and James, you can expect retribution. You can expect your reputation to be soiled. An open-minded tribunal will not exist. The vote is problematic and easy to predict. 3 votes to censure Mayor Pro-Tem Ferguson.

We ask those involved to sign an affidavit of their activities related to the lead up to the vote to hold a censure hearing that includes every discussion, meeting, correspondence, etc. so that the facts are certain that no Brown Act serial meeting occurred. But we won’t hold our breaths waiting. Truth is the great cleanser. But truth about the process that led up to the November 17, 2020 discussion and vote will likely only be known to the few who orchestrated this attempted take-down.

The behavior of the majority is similar to the star chamber activities of Adam Schiff in his attempt to publicly humiliate the president and his team and to remove him from office via impeachment. We know the result of that action, and how he caused irreparable harm to his party. The majority here has caused irreparable harm to the City of San Clemente.

Conclusion

There is no law in San Clemente that allows the Council to censure one of its members.

The vote to set a hearing to censure Mayor Pro-Tem Ferguson violated the Brown Act.

The hearing on November 23, 2020, cannot legally go forward.

Cristina Talley and Scott Smith are required to recuse themselves from any discussion, advice, or legal representation regarding Mayor Pro-Tem Ferguson's possible censure including participation other than as a witness at any hearing.

Govern yourselves accordingly.

Very truly yours.

Brad Malamud

Michael S. Winsten

Baade, Joanne

From: Brad Malamud [REDACTED]
Sent: Saturday, November 21, 2020 7:46 PM
To: Ward, Kathy; Hamm, Chris; James, Gene; Ferguson, Laura; Baade, Joanne; ctalley@talleylawyers.com; Scott Smith
Subject: Violation of neutrality by Scott Smith
Attachments: Special Meeting Letter.pdf

Please see the attached letter.

Brad Malamud
Michael S. Winsten¹

November 21, 2020

To:

Councilmember Kathy Ward – By email: wardk@san-clemente.org
Councilmember Chris Hamm – By email: hammc@san-clemente.org
Councilmember Gene James – By email: jamesg@san-clemente.org
Councilmember Laura Ferguson – Fergusonl@san-clemente.org
City Clerk Joanne Baade – baadej@san-clemente.org
Cristina Talley, Esq. – By email: ctalley@talleylawyers.com
Scott C. Smith, Esq., City Attorney – scott.smith@bbklaw.com
By email only

Special Meeting

Scott:

During our call today, you were insistent that you were not political and that you are fair to everyone.

Yet just after we hung up, you stepped way over the line. You proved you are an advocate for Mayor Pro-Tem Ferguson's adversaries, even though you have a duty not to favor one side over the other (which is why Cristina Talley is representing the 3-member majority).

We spoke yesterday and today under the reality that you, as City Attorney, represented the City, and did not represent Ms. Talley's clients (in this matter) whether or not you have done so in the past, as I believe you have my client, Mayor Pro-Tem Ferguson.

On that basis, we shared with you our strategy, along with requests that you seek due process for the hearing. We did not agree or request you fix procedural mistakes already made by you or the City.

I repeated my request for your recusal on the basis you have strayed from your job and have taken politics to a new level. And that level is to be adverse to my client, Mayor Pro-Tem Ferguson, rather than neutral as required. You have chosen to side with the 3-member majority.

I now have more evidence to prove your bias. This proof requires you to recuse yourself on this censure hearing matter. If you continue on this matter and serve as City Attorney at the meeting/hearing on November 23, 2020, you will be violating every tenant of fairness, and will be violating State Bar Rules, conflict of interest rules, and City and State rules, laws and/or regulations.

1. Michael reviewed this document for content.

PROOF OF THE CITY ATTORNEY TAKING SIDES IN VIOLATION OF HIS DUTY TO REPRESENT THE ENTIRE COUNCIL BY PROVIDING BALANCED LEGAL ADVICE TO BOTH SIDES

We spoke today to find some common grounds regarding procedural issues including the improper notice of continuation of an adjourned Council meeting to November 23, 2020.

You emphatically told Mike (and me) that the notice was sufficient as it was more than 72 hours before the resumption of the meeting.

I informed you that the new item, a hearing to censure Mayor Pro-Tem Ferguson, was not on the original November 17, 2020 agenda, and therefore continuing that meeting could not be accomplished by merely noticing a continuance of an item that never existed on the original agenda.

Again, you emphatically told me I was wrong.

I just learned that at 5:54 pm Joanne Baade, City Clerk, posted notice of a Special Meeting. That notice only requires 24 hours notice to the public. Yet the law states it requires approval of either the mayor, or the majority of Council members.

Because my client informed me she did not approve a Special Meeting, it is obvious that you obtained the approval of Ward, Hamm and James.

But why did you take it upon yourself to create a Special Meeting? The Council members were not part of our conversation where we shared information with you. Michael and I were informing you of the position our client would be taking (through her attorneys) at the November 23, 2020 Council Meeting.

You and/or the Interim City Manager plotted a way to correct the mistake. But that required you (and/or the ICM) to take the information we shared on our case (and you do not represent the 3-member majority) and share that information, either directly or indirectly, with the 3-member majority or their legal counsel, Ms. Talley.

This sharing and action to correct a clear procedural blunder is absolute proof you must recuse yourself. After telling me you don't represent the 3-member majority, which is why we shared the defect with you, you betrayed our trust (that you were not in the pocket of the 3-member majority) and you used that information against our client, Mayor Pro-Tem Ferguson, in clear violation of your ethical and legal duties to her.

I insist you immediately recuse yourself from this matter after this clear display of bias and clear display of violating your duty to provide balanced legal advice to both sides.

Baade, Joanne

From: Brad Malamud [REDACTED]
Sent: Saturday, November 21, 2020 9:27 PM
To: Ward, Kathy; Hamm, Chris; James, Gene; Ferguson, Laura; Baade, Joanne; ctalley@talleylawyers.com; Scott Smith
Cc: Brad Malamud; Mike Winsten
Subject: Response to City Agenda Report
Attachments: Letter TO CITY RE Agenda Report .pdf

Please find attached a letter regarding the November 23, 2020 censure hearing discussing the Agenda Report.

Brad Malamud¹
Michael S. Winsten²

November 21, 2020

To:

Councilmember Kathy Ward – By email: wardk@san-clemente.org
Councilmember Chris Hamm – By email: hammc@san-clemente.org
Councilmember Gene James – By email: jamesg@san-clemente.org
Councilmember Laura Ferguson – Fergusonl@san-clemente.org
City Clerk Joanne Baade – baadej@san-clemente.org
Cristina Talley, Esq. – By email: ctalley@talleylawyers.com
Scott C. Smith, Esq., City Attorney – scott.smith@bbklaw.com
By email only

Re: One sided and Improper Agenda Report Prepared by Scott Smith who is Duty Bound to Recuse Himself

Ms. Ward, Mr. Hamm, Mr. James, Ms. Ferguson, Ms. Baade, Ms. Talley and Mr. Smith:

We represent Mayor Pro-Tem Ferguson and this letter is our response to the one-sided Agenda Report.

This letter is to be included in the Record for the November 23, 2020 Hearing, Item 3.

It is required to be fully read by each member of the Council (as fact finders) before rendering a vote.

This letter reflects consideration of the Agenda Report prepared by Scott Smith for the City Manager's Department and three conversation between myself, Scott Smith and Mike Winsten.

This letter does not address procedural issues. This letter does not address substantive issues. This letter does not address the items listed as charges against Mayor Pro-Tem Ferguson in the Notice.

Basically, this letter is a detailed statement of the failure of the City, and importantly the City Attorney, to provide Mayor Pro-Tem Ferguson due process.

¹ Brad Malamud [REDACTED] SBN: 80361. Brad is the author of this letter because he decided to stop the pretense and clarify and amplify the abuse that has been directed by the City Attorney towards Mayor Pro-Tem Ferguson by the City Attorney; in this case via the supposedly objective Agenda Report that does nothing more than eliminate any semblance of due process and a fair hearing and clarifies that the City Attorney's prejudice has overcome his objectivity and his ability to serve as City Attorney on this censure hearing. The result is that the City Attorney is required to recuse himself, something he sadly has refuse to do.

² Michael S. Winsten 949-633-5458, [REDACTED] SBN: 126554.

The City Website describes the November 23, 2020 Council meetings as “Adjourned Regular City Council Meeting | Business Meeting.

As I explained to Scott Smith on November 21, 2020, this item 3 was not included on the November 17, 2020 meeting that is being continued (that was adjourned). As such, the meeting is improper and a Brown Act violation due to failure to properly notice the meeting.

Scott Smith, as City Attorney, is not allowed to control the facts and law:

Fundamentally, Scott Smith is not empowered to set rules for an administrative hearing. For that reason alone, the Agenda Item is improper.

In response to my asking him the legal authority for him to make recommendations to the Council regarding procedures to follow at the censure hearing, Scott Smith made critical statements.

This is not a hearing. It is a legislative expression of disapproval.

No. That could have been done at anytime without a motion or a second. Any Council member is free to criticize another member any time they want, during City Council meetings or outside City Council meetings. A censure hearing is for the theater of a public flogging. Nonetheless, it is a “hearing” which has legal meaning. Scott Smith’s attempt to say this proceeding is not a hearing is a non-starter. The written charging document provided to Mayor Pro Tem Ferguson is called a “Notice of Censure Hearing”. (Emphasis added), The agenda calls it a “hearing”. The agenda report Scott Smith authored uses the word “hearing” no less than 3 times. The draft resolution included with the agenda report uses the word “hearing” no less than 2 times. You can call a dog an armadillo but it is still a dog.

Scott Smith also said: Common law allows this legislative action.

I informed Scott Smith that censure is not part of common law. It is, instead, a Canon of the Catholic Church. I stated Canon Law is not Common Law. Regardless of whether there was a common law for censure, Scott Smith could not cite the law or the elements of that law, or how the City of San Clemente adopted censure law after eliminating its ethics policy just a few years ago.

Former City Policy 1202-1, effective October 3, 2006, and repealed January 17, 2017³, contained the following due process rights:

³ The January 17, 2017, vote to repeal the ethics policy was 4-0 after a motion by then Mayor Pro Tem Tim Brown, which was seconded by then Mayor Kathy Ward, Council member Hamm was absent and did not vote.

6.0 INVESTIGATION OF VIOLATIONS:

- 6.1 Submission of Complaint: Any person believing that any Official has violated this Code of Ethics Policy shall be entitled to submit a written complaint to the City Clerk. The identity of the complainant shall remain confidential. The complaint shall include a statement specifying in what manner the Official violated this Code of Ethics and the sources of information upon which the complaint is based. All complaints must be signed by the complainant. Anonymous complaints will not be accepted unless the City Council, by majority vote, determines the allegation merits investigation. The City Clerk shall transmit complaints to each member of the City Council and to the alleged violator within twenty-four (24) hours of receipt, and shall agendize the matter for the next occurring City Council meeting.
- 6.2 Initial Investigation: The City Council shall conduct an initial investigation of all formal written complaints from any source with regard to alleged violations of this policy.
- 6.3 Informal Review: If the City Council determines, by majority vote, that the allegation merits formal review, the City Council shall order an investigation of the alleged violation. If, based upon the results of the investigation, the majority of the City Council believes that it is more likely than not that the alleged violation occurred, the City Council shall appoint or retain an independent Hearing Officer and submit the matter to formal review as provided in Section 6.4 below. If the City Council finds that it is not likely that the violation occurred, the City Council shall direct the City Clerk to dismiss the complaint and notify the complainant and the subject of the investigation of the same.
- 6.4 Formal Investigation:
- 6.4.1 Selection of Hearing Officer: The City Council shall appoint or retain an independent Hearing Officer to conduct all formal investigations and appoint or retain a person responsible for presenting the complainant's position in the matter. The Hearing Officer shall not be an employee of the City and shall be qualified and competent to deal with the issues involved in the matter. The Hearing Officer shall conduct a hearing to determine the validity of the alleged violations of this Code of Ethics by public officials.
- 6.4.2 Staff Support: The City shall provide staff support and any other resources available to assist the Hearing Officer. The City Attorney shall be available and shall serve as technical staff for the Hearing Officer throughout the review process.

6.4.3 Cooperation with Hearing Officer: At the request of any party, the Hearing Officer shall have the authority to issue subpoenas to require any employee or any other person to appear and testify, under oath and produce books, memoranda, papers, documents, financial statements, receipts, cancelled checks, or any other relevant information or data in the possession, custody, or control of the person ordered to appear pursuant to Government Code Section 37104.

6.4.4 Procedure: The procedure for conducting the hearing shall be that procedure established for appeals hearings in the City of San Clemente Personnel Rules and Regulations. Whenever an Official is under investigation for any alleged violation of the Code of Ethics, he or she shall receive appropriate notice, in writing, at least thirty (30) days prior to the date set for the hearing.

The rationale for repealing the ethic policy was that it was redundant to, inconsistent with, and superseded by, the laws and rules found elsewhere in the Political Reform Act of the Government Code, as regulated and enforced by the Fair Political Practices Commission's ("FPPC") regulations, which would substitute as the City's ethics policy. Well, if that was true, and it must be since the Staff Report recommending repeal, was authored by City Attorney Scott Smith, where are the censure rules in the Political Reform Act and the FPPC regulations? Why are the two agenda reports for this censure proceeding silent on any reference to the Political Reform Act or the FPPC? The answer must be there are no censure rules in the Political Reform Act or the FPPC regulations. That being the case, this proceeding is unauthorized and cannot move forward.

Did it make sense to jettison the ethics policy, with its plentiful due process procedures and protections, including 30-days prior notice, the right to call and subpoena witnesses and documents, and an independent Hearing Officer, while secretly keeping (unknown to the Council or at least not mentioned in the discussion or Agenda Reports to the best of my recollection) the heretofore never disclosed censure procedure that Scott Smith is making up as he goes along?

We discussed that on Friday, Scott Smith concurred that Mayor Pro-Tem Ferguson was and would be the Mayor at the hearing. Then, after that call, Scott Smith "told" the Council it could, instead, "determine which member shall preside."

I replied: "That is not the law. Mayor Pro-Tem Ferguson will chair the hearing."

Scott Smith replied: There is no economic effect if the Council censures Mayor Pro-Tem Ferguson. She would be making the calls. I have never seen anyone do that. It will be awkward.

So what? As we agree on Saturday, the Council members always have the right to over-rule the chair. But they don't have the right without proper notice to the public to replace the chair, when as Scott Smith said, it has no financial impact to Mayor Pro Tem Ferguson.

I asked Scott Smith the legal basis for him to prepare this agenda report on procedural aspects of a censure hearing. He did not answer that question at the time, instead saying he felt the Council could use guidance on how common law censure is done. Remarkably, he said he prepared his guidance in a “balanced” manner.

Yet it is clear that during his term in San Clemente there has never been a censure hearing.

I then asked why there was only one Resolution that only found in favor of censor on all counts.

His reply caught me by surprise. Scott Smith didn’t draft the Resolution. No, it was presented to him by former Of-Counsel to BB&K, Cristina Talley. I asked why we didn’t get to present him a Resolution (against censuring Mayor Pro-Tem Ferguson) and he did not answer.

When asked who “staff was,” Scott Smith responded Erik Sund and Scott Smith.

Scott refused to really discuss “due process” and said any such discussion was a waste of his time as we disagree. Maybe so. But Scott Smith is setting the rules for the 3-member majority by his suggestions that will be turned into reality. He said he would find out what Eric Sund and Joanne Baade think. Why?

Mike questioned the Resolution including items that were abridgments of Mayor Pro-Tem Ferguson’s first amendment rights. Scott agreed on the first amendment stating that with certain qualifiers, Mayor Pro-Tem Ferguson cannot be censured for first amendment speech.

I questioned the Resolution items purporting to set forth restrictions on future conduct that are illegal prior restraints and not set forth in the Notice of Censure Hearing charges.

Scott Smith said he would consider my statement that there was no Notice for future restrictions which would be “policy” and for which no proof or facts are relevant vis-à-vis Mayor Pro-Tem Ferguson’s conduct to date (for which the censure hearing is being held). I asked as a follow-up if he would provide us the items that violate Mayor Pro-Tem Ferguson’s first amendment rights and those items that go beyond the scope of the Notice, given the short time we have to prepare. He stated he would talk to staff and Cristina, but no, he would not tell us.

I asked Scott Smith for the legal elements for CENSURE, i.e. what must be proven to prove a censurable act occurred. Scott Smith remarkably refused to answer, stating censure is a legislative function. Yet after telling me his involvement is proper and necessary because he is the City Attorney, he refuses to provide Council guidance on the elements of censure that need to be proved to convict Mayor Pro-Tem Ferguson.

Then, I explained the facts of the Garlic Breadth censure as an example why a prior censure policy and procedure is required: Supposed another Council member brings a censure charge that Mayor Pro-Tem Ferguson has bad breath at Council meetings and therefore censure is appropriate. Supposed Chris Hamm testifies that he sat next to Mayor Pro-Tem Ferguson one night and he could smell garlic on her breath. Mayor Pro-Tem Ferguson then admits that on one occasion she had Italian food just before the meeting (when live in-person meetings were still important), and didn’t have time to brush and gargle. GUILTY? No. Bad breath is not enough for censure. It does not arise to some required level of bad conduct. Or does it? That is the

point. That is why the City Ordinance, not non-existent Common Law, must precisely provide the conduct that is not allowed and for which Mayor Pro-Tem Ferguson can be censured. Due Process demands this level of pre-charging definitions.

I again asked Scott Smith for the legal elements for CENSURE. Again, Scott Smith refused to answer. This is the problem. The Council Members are not attorneys, and if they were, surly they would demand that somebody provide the Council with the elements necessary to prove censure charges. But Scott Smith, the City Attorney, refuses to do that. And for good reason. Without a statute or ordinance, like the present case, there are no rules. There are no grounds to bring a censure action.

I informed Scott Smith that allowing Cristina Talley to serve as the 3-member majority's counsel is reversible error (so to speak) as she was a former BB&K Of-Counsel, and was a Deputy City Attorney. Without even mentioning the Rules of Professional Conduct, instead he stated what a professional attorney she is. According to Scott Smith, Cristina Talley knows the area of law well, she and Mayor Pro-Tem Ferguson have a pleasant and cordial relationship, the FPPC has made her a city representative and added her to a committee, and she is uniquely qualified on matters of ethics (raising the issue that the City abandoned its ethics policy). Notice the sleight of hand? Scott Smith did not address the previous service issue or BB&K's current involvement, or her current open contract with the City of San Clemente. When questioned, Scott Smith replied: She has been gone from BB&K for two years. Scott Smith represented she left BBK before Mayor Pro Tem Ferguson was elected and took office. Maybe. Or maybe not. What exact date did Ms. Talley leave BBK? Scott Smith said: There is no problem here.

We disagree.

I told Scott Smith there was simply not adequate time to prepare on the substantive issues. As of this writing, neither Mike nor I have done anything more than review the Notice regarding preparing a substantive defense. I explained that situation and requested more time and for the City to continue the hearing. Silence was the answer.⁴

Analysis of the Agenda Report with the basic premise there is one consistent thread: Scott Smith's Agenda Report is not fair and balanced and due process concerns have not been remedied.

Page 1 of the Agenda Report for November 23, 2020 makes a rather startling statement:

To ensure proper due process, the City Attorney's Office recommends the following safeguards:

I could write a doctoral thesis on this agenda report. The City Attorney (and apparently members of his office), in the guise of preparing an Agenda Report to ensure Mayor Pro-Tem "proper due process" does just the opposite. While certain due process rights were provided, or

⁴ The ethics policy was repealed on January 17, 2017,

more correctly are being recommended, most were either denied, or limited. The proposed rules are stacked against Mayor Pro-Tem Ferguson.

As stated below repeatedly, statements and analysis by the League of California Cities, by the State Bar Rules, and other laws require that the City Attorney “**must provide balanced legal advice to both sides.**”

What is not mentioned anywhere in the City Attorney’s (Office) list of due process guarantees (many listed below) is that on November 17, 2020, the City, unimaginably provided, presumably with the full knowledge and active participation of the City Attorney, the 3-member majority with legal counsel, Cristina Talley, at the City’s expense, but never offered that option to the accused Mayor Pro Tem Ferguson. Why not? How is that fair?

Yes, the City paid \$300 per hour for Ms. Talley to be present and attend the hearing on Item # 9C. Her mere appearance on behalf of the 3-member majority was sufficient to violate Mayor Pro-Tem Ferguson’s due process rights at the following November 23, 2020 censure hearing.

Item 9C was an innocuous Agenda Item. It was short and to the point. Item 9C sought guidance by the Council to Staff to create a process and guidelines for future censure of a Council Member. Nothing in the Agenda Item description or the Agenda Report even hinted, let alone stated, that the item would 1) lead to discussion of censuring an individual Council Member, and 2) that there would be any discussion of the reason to censure an individual Council Member.

But it turns out, the 3-member majority and/or staff with or without the assistance of the City Manager, planned a coup, or something tantamount to a coup. How do we know? Because while Item 9C Agenda Report was under the Brown Act limited to a discussion of providing guidance and direction to Staff, not one word, not one, of comment was directed towards providing that direction. In fact, and critically so, there was no discussion of direction, but there also was no vote on a motion to provide direction.

Instead, Council Member Ward appears to have violated the Brown Act, with the full permission of the City Attorney (he did not object) by reading a well-drafted pre-prepared extensive list of censure charges against Mayor Pro-Tem Ferguson.

Ms. Ward followed immediately with a motion to hold a hearing less than one week later, a special Council Session, a very irregular and infrequent request, to censure a single Council member, Mayor Pro-Tem Ferguson. Almost immediately, and without comment, she had three votes, the “3-member majority” was officially united to skewer the reputation of their fellow Council member Mayor Pro-Tem Ferguson, and gleefully so.

Mayor Pro-Tem Ferguson was not afforded the opportunity to state her positions and objection to the proposed hearing. No, neither the 3-member majority, nor the City Attorney, were concerned with affording Mayor Pro-Tem Ferguson the due process rights to discuss the issues involved in the Motion to hold a hearing in 6 days to censure Mayor Pro-Tem Ferguson. Yet Council Policy, including Rosenberg’s Rules of Order, require discussion before a vote is called. And don’t confuse yourself that this was a simple request by one Council member to agendize an item on the upcoming Council Agenda, a process that I, personally, requested for more than 5 years

before it was enacted. No, that only requires a request by one Council member and the affirmation by a second Council Member. This was something far more sinister and planned in advance. This was a request by way of motion, requiring a majority vote, to set a special hearing BEFORE Chris Hamm left the Council on December 1, 2020, to put a shive in the body of Mayor Pro-Tem Ferguson, and be present for the bleeding.

Getting back to Cristina Talley.

Why was she at the hearing and why did she comment on Item 9C? Because, according to the City Attorney, she represented the 3-member majority. But why?

There was nothing on the Agenda Item 9C that required independent Council to represent the 3-member majority (to provide directions to Staff). So there had to be a grand plan that required her attendance. That plan was to censure Mayor Pro-Tem Ferguson, not direct staff to prepare a process to censure.

The City, not the 3-member majority, hired Cristina Talley, as independent Council because the City Attorney cannot take sides, nor can any BB&K attorney. Someone at the City agreed to pay her for those services directly. It appears her contract was approved under the City Manager's \$25,000 unilateral authority, which does not require City Council approval.

Therefore, there is little doubt that the plot to hold the hearing was hatched well in advance of the November 17, 2020 Item 9C.

Cristina Talley was hired for the 3-member majority and likely met with them, and possibly with the City Attorney and the City Manager. This raises an additional legal concern that she likely served to circumvent the Brown Act restriction on more than 2 Council members meeting to discuss censure of Mayor Pro-Tem Ferguson by facilitating a serial meeting outside a noticed open session regarding censure of Mayor Pro-Tem Ferguson. But that is inferential and circumstantial at this point.

Cristina Talley was never permitted, under State Bar Rules, and conflict of interest laws, to represent the 3-member majority. Why? Because she is tainted by her 5-year services as Of-Counsel that ended two years ago with Best, Best & Krieger, the law firm of City Attorney Scott Smith. But if it can, it gets worse. She not only worked at the law firm whose members could not serve the 3-member majority in this capacity (to the detriment of Mayor Pro-Tem Ferguson) but she was actually a Deputy City Attorney for the City of San Clemente during her carrier as Of-Counsel at Best, Best & Krieger and even worked on a case/settlement directly with Mayor Pro-Tem Ferguson. Mayor Pro-Tem Ferguson, at least during that matter, was Cristina Talley's client.

Cristina Talley is or should be aware of conflict of interest laws. That was the reason she was brought in as counsel to the 3-member majority. Scott Smith, and his BB&K attorneys, were conflicted out of representing the 3-member majority.

Yet, the City did not inform Mayor Pro-Tem Ferguson that Cristina Talley would be involved or that Mayor Pro-Tem Ferguson likewise was entitled to independent counsel. Why not? But Scott

Smith refused to answer this question. I asked him for all communications between the City and the 3-member majority regarding providing them independent counsel. I have not received those documents and likely never will.

The City did not inform Mayor Pro-Tem Ferguson that Cristina Talley would represent the 3-member majority to her detriment and specifically to prosecute an action to censure Mayor Pro-Tem Ferguson. Worse yet, if that is possible, the City failed to offer Mayor Pro-Tem Ferguson the assistance of independent counsel, period. Yet under the Government Code Sections 825 and 995, it is required to pay for an attorney to represent her at the proceeding (Item 9C) and in preparation for and for the upcoming censure hearing.

On November 20, 2020, when Brad Malamud informed the City Attorney by phone that Mayor Pro-Tem Ferguson was demanding independent legal representation already provided to the 3-member majority, the City Attorney acted stunned and stated he was unaware she wanted or would benefit from her own counsel. He further asked why she didn't ask for counsel for the November 17, 2020 Item 9C discussion. Perplexing doesn't approach my concern for those statements. Apparently the person who drafted the Agenda Report to provide Mayor Pro-Tem Ferguson due process rights at the censure hearing lacked any concern to inform Mayor Pro-Tem Ferguson that the City is required to provide her an attorney at City expense based on Government Code and reciprocity (what was provided to and for the 3-member majority must mandatorily be provide to and for Mayor Pro-Tem Ferguson).

Missing from any discussion by the City Attorney was that this hearing is the final insult directed at Mayor Pro-Tem Ferguson before one of its members, Council member Chris Hamm, retires from the Council. The censure had to come on his watch.

**“Do not go gentle into that good night,
Old age should burn and rage at close of day;
Rage, rage against the dying of the light.
Though wise men at their end know dark is right,
Because their words had forked no lightning they
Do not go gentle into that good night.**

**Good men, the last wave by, crying how bright
Their frail deeds might have danced in a green bay,
Rage, rage against the dying of the light.**

**Wild men who caught and sang the sun in flight,
And learn, too late, they grieved it on its way,
Do not go gentle into that good night.**

**Grave men, near death, who see with blinding sight
Blind eyes could blaze like meteors and be gay,
Rage, rage against the dying of the light.**

**And you, my father, there on the sad height,
Curse, bless me now with your fierce tears, I pray.
Do not go gentle into that good night.**

Rage, rage against the dying of the light.”

– Dylan Thomas, Do Not Go Gentle Into That Good Night

Rage, Rage. Do not go gentle into the good night. Chris Hamm and other Council members can **Rage, rage against the dying of the light**, all to humiliate Mayor Pro-Tem Ferguson. The decision to attack Mayor Pro-Tem Ferguson before the new City Council meets on December 1, 2020 was cowardly, disrespectful, and planned to inflict the most damage possible (as the Council members could simply have stated on the record that Mayor Pro-Tem Ferguson’s actions violated whatever standard they believed she is required to meet). Instead, for the first time in over 30 years and likely for the first time ever, the 3-member majority did a last minute hit and run on a defenseless fellow Council member to insure inflicting the most damage possible.

This censure proceeding could have been pursued months and months ago, yet was not initiated until after the November 3, 2020, election, for some odd but obvious political reason. There is no emergency now that required the Council to set a special session for November 23, 2020 during the week of Thanksgiving. There was no emergency that required the hearing be held before Chris Hamm left the Council. But the 3-member majority hatched a plan to stab their fellow Council member in the back, in public, on YouTube, before the new Council was seated on December 1, 2020. The assassination must take place, in the public square for all to see, with the Council members prominently displayed and with their independent counsel at their side. Surely, humiliating Mayor Pro-Tem Ferguson must be accomplished. Retribution must occur. Fairness be damned.

Consideration of Mayor Pro-Tem Ferguson’s due process rights must, therefore, take a back seat to demonstrating to future candidates: If you disagree with us, we will dredge up a never-used censure and charge and then convict you of being our enemy. The mere thought of what is occurring is disgusting and will lead to long term chaotic consequences. If it becomes the norm, a 3-member majority can hold censure hearings at any time on 4-day notice with no standards, no ordinance, and little due process.

The mere thought that anyone would believe it is proper to use precious City funds when the City is on the precipice of financial harm due to what is becoming a long term Covid-19 pandemic emergency on a vengeful political process for sport to castigate Mayor Pro-Tem Ferguson, is even more disgusting. Does using City funds to punish a fellow Council member amount to a FPPC violation? I don’t know and I don’t really care. It should never have happened.

Mayor Pro-Tem Ferguson continues to have two attorneys working full-time in a futile attempt to prepare for the upcoming November 23, 2020 censure hearing of their client, Mayor Pro-Tem Ferguson.

Due to a lack of time to prepare, I began writing this section of this letter at 3am (it is now 4:17am). I stopped working on the draft last night at 9:12.

This letter is an attempt to obtain due process rights for my client, Mayor Pro-Tem Ferguson, that would not be necessary if the City had 1) an ordinance to censure Council Members, 2) an

ethics policy, 3) rules for administrative hearings that the City Attorney agrees apply to the censure hearing, and 4) the grounds for conviction on the charges (the elements of a violation of censure rules). Instead, "To ensure proper due process" the City Attorney is creating the process rules on the fly.

Getting back to Cristina Talley. She is required to recuse herself from representing an interest of the 3-member majority. When asked by Mayor Pro-Tem Ferguson on November 17, 2020 to recuse herself, Cristina Talley failed to mention that during her tenure at BB&K, she served as San Clemente Deputy City Attorney. She failed to mention when she was assigned to, or began serving, as independent counsel to the 3-member majority. She failed to mention that Mayor Pro-Tem Ferguson was entitled to independent counsel.

Former BB&K attorneys including Cristina Talley, in particular those that served the City of San Clemente, are barred from representing interests adverse to Mayor Pro-Tem Ferguson. Cristina Talley is not exempt. That is why a current BB&K attorney was not assigned to the 3-member majority. Conflict of interest rules are included in the SC Municipal Code and case law, state law, and State Bar Rules of Professional Conduct. Maybe all involved in this transgression will blame this lack of knowledge and conflict of interest on amnesia, some obscure interpretation of the Rules and laws, or some other hyper-technical explanation. But it does not matter. Wrong is wrong. Attorneys are required to bend over backwards, so to speak, to protect their former clients. They planned out, and executed, an insider coup to take down and disparage and humiliate Mayor Pro-Tem Ferguson with the full knowledge of their actions.

Cristina Talley is required to step down, recuse herself, even if all the above is untrue because at a minimum, there is the appearance of impropriety based on her former BB&K relationship.

Which takes us full circle back to City Attorney Scott Smith and his statement "**To ensure proper due process.**"

Due process requires time to prepare for a hearing. Not a word was used to discuss the short notice. 4-days is insufficient to prepare for 10 separate charges.

The Agenda Report fails to even provide the limited level of due process set-forth in the SCMC for administrative hearings. Worse yet, Scott Smith failed to even mention why those limited rights are not included in his list of required due process rights.

Mayor Pro-Tem Ferguson will not be afforded:

- 1) an independent hearing officer,
- 2) at least 10-day notice of the hearing, if not 30-days like the old ethics policy provided,
- 3) an attorney paid for by the City even though one has been provided to the 3-member majority,
- 4) any evidence against her (which is the bedrock of legal process referred to as discovery). There is nothing more than the Notice. No evidence. No documents. Just the charges.
- 5) a shocking statement that the Mayor shall be replaced by members determining who shall preside, even though I informed the City Attorney that the Mayor Pro-Tem will not relinquish

her position and that the Council is not permitted to replace her during the meeting. Scott Smith agreed on Friday, but now demands that due process allows the Council to replace her because "It will be awkward", without authority.

During our conversation, Scott Smith admitted Mayor Pro-Tem Ferguson could not be replaced by the 3-member majority without proper notice and a vote. That is the law.

This is an attempt to treat Mayor Pro-Tem Ferguson unfairly and to side-step the law.

He stated during our conversation that if she serves, the Council will be permitted to overturn every one of her decisions. Scott Smith was an advocate for the 3-member majority.

On being informed that Mayor Pro-Tem Ferguson would preside, he immediately found a solution, overturning every one of her decisions. Then, cleverly, he informed Council that due process REQUIRES them to select a member to preside at the meeting. These two facts, and they are facts, prove beyond any doubt that Scott Smith cannot serve on November 23, 2020 as a neutral and fair City Attorney. He is, beyond any doubt, an active advocate for the 3-member majority. He is an active opponent of Mayor Pro-Tem Ferguson.

6) No opening or closing statement were permitted (or were not mentioned). Hopefully that is cured.

7) No limited rules of evidence were provided so that the parties are unaware what evidence will be allowed. How can one prepare for that unknown set of rules and who will control the evidence to be viewed and reviewed by the tribunal? Even the elements of the "crime" of censure are not provided to the Council.

8) There will be an arbitrary time limit on Mayor Pro-Tem Ferguson's defense. No time limit is included in SCMC 1.20.080 to defend oneself at an administrative hearing. None should and can be set here. A defense and a prosecution take the time necessary. Due process demands fairness.

Another important point: Scott Smith's entire rules for the hearing are stated in less than 2 pages. Understand the rules of evidence, court procedures, even the San Clemente Municipal Code rules for administrative hearings are far more detailed and are interpreted by a hearing officer not 4 non-attorneys.

Scott Smith, knowing the rules will be read and interpreted against Mayor Pro-Tem Ferguson by the 3-member majority, none of whom are attorneys (they do have the assistance of Cristina Talley, but she is tainted by her BB&K service), cannot possibly understand the gravity of the lack of due process and in particular the lack of due process safeguards. Fairness is denied Mayor Pro-Tem Ferguson. Remember, Scott Smith promised or stated a strategy that on every procedural ruling, the 3-member majority will take a vote to overrule the Mayor Pro-Tem. Regardless of the rules, Scott Smith has set out a plan that allows the 3-member majority control all due process issues. Recommending that procedure is not neutral balanced representation.

The presence of City Attorney or any BB&K or former BB&K attorney at the November 23, 2020 Council meeting, other than as a witness that I or Mike can examine and cross-

examine, is a violation of conflict of interest rules and laws, and of due process. On this basis, Mayor Pro-Tem Ferguson repeats her demand that both Scott Smith and Cristina Talley recuse themselves from any involvement in the censure of Mayor Pro-Tem Ferguson. On this basis alone, the November 23, 2020 hearing must be postponed until the damage done by Scott Smith can be undone.

On Friday on two occasions, Scott Smith, Mike Winsten, and I spoke regarding ground rules and issues related to the upcoming November 23, 2020 meeting. At that time, we appeared to have agreed on a number of solutions to your earlier statement that Mayor Pro-Tem Ferguson's attorneys would be limited to the same time as a resident, and other issues regarding procedure, law, etc.

Regardless, as we informed you, this Council meeting is out of order, cannot go forward, and Scott Smith and Ms. Talley are required to, but have not, recused as required under applicable law including but not limited to State Bar Rules.

As City Attorney, and drafter of the Agenda Report, Scott Smith has a duty of fairness, objectivity, and to represent both the 3-member majority and Mayor Pro-Tem Ferguson.

According to the League of California Cities, *Counsel or Council: A Guide For Building A Productive Employment Relationship*:

In general terms, the city attorney takes direction from a majority of the council. ... However, given the nature of legislative entities, which may often be split with a consistent "majority" and "minority," the city attorney must provide balanced legal advice to both sides.

Throughout this letter, I will emphasize this requirement, along with evidence and proof Scott Smith failed this requirement. City Attorney Scott Smith sold out Mayor Pro-Tem Ferguson to his supporters, the 3-member majority and failed to present "**balanced legal advice to both sides.**" This theme will become crystal clear.

Scott Smith refused to recuse himself. Why? He would not lose money as this should be part of his City Attorney job covered by his monthly flat fee retainer. (Although, defending any resulting litigation will be an additional hourly expense.) The reason is clear, he wants to control the outcome.

The Agenda Report is oozing of politics.

A few examples:

Every legal opinion is slanted in favor of the 3-member majority.

All procedural rules are slanted to the 3-member majority.

Only one side, the 3-member majority, is discussed.

The Resolution was drafted by the 3-member majority's counsel.

The City Attorney did not request Mayor Pro-Tem Ferguson supply a Resolution.

The City Attorney did not state the resolution was drafted by someone other than him. I was surprised to learn he allowed one of the parties, so to speak, to pre-ordain the results, a conviction.

Staff only provided the Council one resolution, thus clearly indicating how to vote.

There is no resolution in the event the tribunal find against censure.

Most critically, the Resolution contains prohibitions that are policy, not censure related, and thus are beyond the scope of the Notice. Any such findings violate Brown Act restrictions on notice and cannot be approved by Council on November 23, 2020.

Section 6 is illegal. This remedy goes far beyond CENSURE, and you know that. Section 7, likewise includes a “cease and desist” provision, yet Ms. Ward and the 3-member majority, made no request for such a remedy, and that remedy far exceeds the limits of CENSURE. It also requires Mayor Pro-Tem Ferguson to in certain circumstance only speak privately to the City Manager. Again, that issue is not before the Council.

Section 7 requires Mayor Pro-Tem Ferguson to in certain circumstance only speak privately to the City Manager. Again, that issue is not before the Council and exceeds the scope of CENSURE.

Section 8 directs the City Manager. The Agenda Report and the Motion by Ms. Ward did not mention discussions of directing the City Manager to do anything. Thus, any such discussion is beyond the scope of item 3.

Section 9 is a statement that the Council will, in the future, pursue any and all remedies available by law to prohibit such conduct. Again, this is beyond the scope of the noticed item 3.

Even brining this censure hearing is a threat against Mayor Pro-Tem Ferguson: “SHUT UP OR WE WILL BURY AND HUMILIATION YOU. WE WILL MAKE YOUR LIFE MISERABLE”

As I told you on the phone, “fairness is the standard” that should be applied to the decision on 1) whether to move forward with the censure hearing, and 2) the rules that apply to that hearing.

All of you have Mike and my 35 page + letter regarding the reason the hearing cannot proceed on Monday November 23, 2020, and why any hearing that is held must follow San Clemente, state, and federal due process and administrative rules. Because of this, I won't repeat most of the grounds and arguments contained in that letter.

Analysis of the Agenda Report (By Agenda Report Heading, in order):

Fiscal Impact:

On the fourth line of the Agenda Report, City Attorney Scott Smith misstates the fiscal impact of holding the November 23, 2020 Special Council Meeting.

“Approximately \$3,-5,000.”

While Scott Smith fails to state how he arrived at this pittance of an amount(s), it is the costs of the City providing Cristina Talley legal services to the 3-member majority. That amount was arrived at without considering responding to Mayor Pro-Tem Ferguson’s attorneys, and preparation and appearance at a fierce litigation battle.

The paltry sum did not include additional and overtime for Staff, utilities, sheriff services if required, zoom costs, IT and video technicians, City Attorney billing, and critically the City’s obligation to pay Mayor Pro-Tem Ferguson’s attorneys. In all, it is likely those costs may exceed \$50,000.

But those costs don’t include the litigation costs that will follow to overturn any decision by the tribunal to censure Mayor Pro-Tem Ferguson in violation of her due process rights and substantive rights for failure of the tribunal to make findings based only on evidence presented to the Fact Finders rather than their alleged historic recollection of events, especially those not subject to the Notice of 10 supposed violations. It is anticipated the cost of that litigation could exceed \$250,000, possibly far more.

Based on the above analysis, a conservative estimate of the Fiscal Impact is \$50,000 - \$300,000. Yet this is all to humiliate and chastise Mayor Pro-Tem Ferguson for political retribution. The 3-member majority, at City expense, decided to punish a Council member, and the City Attorney chose to minimize the true cost of that effort.

After drafting this section, I informed Scott Smith of this concern. He stated he would remedy this. But how is that possible? The Agenda Report won’t change.

Background:

Scott Smith says: **“A legislative body may censure a member.”** False.

The statement is or should be read as part of a syllogism. All dogs have four legs. Elmer has four legs. Therefore, Elmer is a dog.

But while some legislatures may be able to censure members, not all legislatures can censure members. You see, not all four-legged animals are dogs. Not all legislatures have laws that allow censure. San Clemente went further and eliminated ethic policies.

Scott Smith is well aware of this syllogism based predicate, because I explained to him during our conversation that *Braun v. City of Taft* does not stand for the proposition that all legislatures can censure. That case has nothing to do with that “fact.” In fact for you that don’t have the time to read the case, and it is likely that Scott Smith has never read the case given his position, the case never mentions whether or not the City of Taft has a law that allows censure, and for very good reason. On appeal neither party challenged that there was no city law allowing for censure. Thus, the case does not even decide the issue.

Yet in San Clemente there is no law allowing the City Council to censure one of its members. In addition, Scott Smith fails to inform the public that just a few years ago, the City Council

eliminated its ethics policy entirely, thus clearly stating it would not hold its Council members to any ethical standards. Thus, even if a censure might otherwise be permitted, the grounds for censure were eliminated by a majority vote of the Council, and while I am not certain, I seem to remember both Ms. Ward and Mr. Hamm voted to eliminate the ethics rules. It is now rich for them (at least they were present when the vote occurred and know the results) to now voted to apply ethics rules to Mayor Pro-Tem Ferguson.

Scott Smith was informed after I drafted this section that his other reason for allowing the Council to censure without an ordinance is common law. But censure is not common law. It is, instead, Catholic Canon Law. San Clemente does not apply Catholic Canon Law. That would violate the Constitution's requirement of the separate of Church and State.

Discussion:

“To ensure proper due process, ...”

Before getting into the details of the **Discussion** portion of City Attorney Scott Smith's Agenda Report, it is critical what he was trying to accomplish regarding Due Process.

It was not to provide Mayor Pro-Tem Ferguson DUE PROCESS. Scott Smith makes clear that on behalf of the 3-member majority, his advice is to only provide Mayor Pro-Tem Ferguson **“proper due process.”** **Proper** is the operative word. Proper is based on Scott Smith's opinion of proper. It is not based on any standard. Scott Smith has not addressed ex post facto, lack of time to prepare, limits on time to present a defense, COVID-19 restrictions on witness visual testimony or even oral testimony.

All words have meaning. The word proper was used for a reason and that reason was to limit, not expand or guarantee, Mayor Pro-Tem Ferguson's “due process.”

Websters Dictionary has multiple definitions for “proper”, but the ones that jump out include, 1) very good, 2) strictly limited, 3) strictly accurate, and 4) marked by suitability, rightness, or appropriateness: fit.

None of the definitions equate to full, complete or total. Scott Smith chose the word “proper” to make sure everyone knows, especially the 3-member majority and their counsel Cristina Talley, that Mayor Pro-Tem Ferguson was only to be provided those due process rights that Scott Smith thought are strictly limited, and are suitable and appropriate.

Yet under the law, Mayor Pro-Tem Ferguson is entitled to full (not proper) due process rights.

Transitioning to the beginning of the section Discussion:

“A censure is generally understood to be “an official reprimand or condemnation; an authoritative expression of disapproval or blame. ... The City Council has the authority to censure an individual Councilmember. (Braun v. City of Taft ...)” [no italics in original] [examples follow]

There is a lot to unpack in these two statements.

The definition of censure proves the Resolution goes well beyond censure (which actions are not in the motion for a hearing approved 3 – 1 on November 17, 2020.) Controlling or requiring future conduct (Sections 6 – 9) are not examples of “reprimand” or “condemnation.”

As for authority to censure, *Braun v. City of Taft (1984)* does not stand for the proposition that any city can censure a council member if that city 1) eliminated its ethics code, and 2) has no law regarding censure.

But Scott Smith knows that. When I reviewed all the cases that cited (referenced) *Braun*, not one of them discussed the situation where a city censured a council member (or legislator) and the council member or legislator asked the court to over-turn the censure because the entity did not have a censure law. Scott Smith knows this is a leap, as even the *California Municipal Law Handbook*, the bible for city attorneys, states about *Braun*:

Without any discussion, the court seemed to assume that a city council had authority to censure a member. There was also no discussion of either the nature of the censure action or due process requirements. Section 1.228.

For those that are not lawyers, that means, as detailed above, the case does not stand for the proposition that a city can, without a censure ordinance, censure one of its council members. Nor did the *Braun* case concern itself with the issue of whether due process prior notice of the “crime that must be committed” is required to bring a censure action.

But Scott Smith was aware of this issue, as I explained it to him in detail before he filed the Agenda Report. Apparently, the best he could do is repeat the questionable conclusion/misstatement.

But getting back to being political and fair, even if Scott Smith believes his interpretation is correct, as a city attorney he is required to be impartial and present both sides of a controversial issue.

According to the League of California Cities, *Counsel or Council: A Guide For Building A Productive Employment Relationship*:

In general terms, the city attorney takes direction form a majority of the council. ... However, given the nature of legislative entities, which may often be split with a consistent “majority” and “minority,” the city attorney must provide balanced legal advice to both sides.

Only one paragraph into the Discussion, and Scott Smith has failed to present Mayor Pro-Tem Ferguson’s side of the law.

The City’s Municipal Code does not prescribe a censure process, but common law contains certain guidelines, ... The most important of these is a public hearing, where the concerns are presented and the member in question has the opportunity to hear and responds to them.

Is this true? We don't know. Scott Smith fails to reference or describe any common law applicable here. He fails to state how eliminating the prior ethics policy without replacement does not prove that the City of San Clemente did not adopt a common law censure, if it actually existed.

The fact that a common law censure may, but likely did not exist, is irrelevant to determine if San Clemente adopted censure common law. For example, if common law allows beheading or sex discrimination, that doesn't mean San Clemente City Council can proceed to behead, or discriminate on the basis of sex against, those it disfavors.

Scott Smith states common law censure has certain guidelines, but fails to list them, other than the most important according to him; a public hearing. What about the ex post facto laws, that the act must be illegal before the crime is committed?

But let us explore CENSURE. While wiki is not scholarly material, it does present information. Here, wiki describes censure as a Catholic Church doctrine, not a governmental common law.

[https://en.wikipedia.org/wiki/Censure_\(canon_law\)](https://en.wikipedia.org/wiki/Censure_(canon_law))

A *censure*, in the canon law of the Catholic Church, is a medicinal and spiritual punishment imposed by the church on a baptized, delinquent, and contumacious person, by which he is deprived, either wholly or in part, of the use of certain spiritual goods, until he recover from his contumacy.

No mention therein is made to cities or local government's use of censure.

Likewise, US Legal, <https://definitions.uslegal.com/c/censure/>, states:

In canon law, censure refers to the process by which a cleric is deprived, entirely or partially of the use of the power of orders, office, or benefice. Ecclesiastical censures are medicinal and spiritual punishments imposed by the Church on a baptized, delinquent, and contemptible person, by which he is deprived, either wholly or in part, of the use of certain spiritual goods, until he recover from his contempt. Theological censures are doctrinal judgments by which the Church stigmatizes certain teachings detrimental to faith or morals.

Due process requires ordinances so that those accused are aware before their actions of the conduct that is required in order to break the law.

Yet even though I explained this in detail to Scott Smith, he failed to advance any new arguments for the proposition that San Clemente has adopted censure. Nor did Scott Smith refute that the City eliminated ethics rules. How is it possible that ethics were thrown out, but unethical conduct results in censure? Scott Smith knows that based on the elimination of ethics policy in San Clemente, censure was certainly not ratified as the law of San Clemente.

Nor did Scott Smith inform the Council and public that there has ever been a single hearing to censure a City Council member. Assuming there hasn't been one, and there hasn't for at least

the last 30 years, then this is evidence that there is no censure law in San Clemente, or that if there once was, it was abandoned long ago.

Remember, Scott Smith is the City Attorney for the entire City, including Mayor Pro-Tem Ferguson. He owes her a duty of fairness. He has demonstrated beyond any doubt that he refuses to treat her fairly. For this reason alone, Scott Smith must recuse himself and likely is required to resign as City Attorney.

Along with the job comes responsibility. It is true the attorney-client relationship is muddy in the area of City Attorney, Council Members, City, City Manager. Who is the client? The answer is not always clear, but the City Attorney is a highly paid expert who should not have any trouble discerning who his client is. The City Attorney is required to err on the side of each of them being his client, and to provide balanced advice covering all sides of all contentious issues. And if Mayor Pro-Tem Ferguson is his client, as we believe she is, then he cannot be involved in her censure and her censure hearing. And even if he can, the lack of fairness in the Agenda Report and in prior conduct dictates that at least with respect to the hearing, she can have him removed for cause. Such a right is given in administrative hearings with respect to the hearing officer.

I have provided more than enough evidence that Scott Smith is not “neutral” when it comes to Mayor Pro-Tem Ferguson and the issue of her censure. He recommends in the Agenda Report, apparently backed by the Interim City Manager, that the Finders of Fact, the 3-member majority, adopt a pre-written resolution finding against Mayor Pro-Tem Ferguson on all charges. No “neutral” City Attorney, judge or non-party attorney or hearing officer would recommend conviction as the pre-ordained outcome.

As described more fully, the resolution even recommends conviction on all 10 counts. Even a jury is given two boxes to check, one to find in favor and one to find against. But the “fair” City Attorney Scott Smith did not provide two resolutions.

It appears that among City Attorney and Interim City Manager skill set is the ability to read the future, ala Kreskin. It is unfortunate that apparently Mayor Pro-Tem Ferguson’s poker hand is already dealt, and she lost. Or at least that is how they read the cards.

What is the source of the predicate of Mr. Smith’s argument that common law exists for “censure” and that the lynchpin is a public hearing? Scott Smith offers no citation for his conclusions to the detriment of Mayor Pro-Tem Ferguson. Fair and honest? You be the judge.

A google scholar search of the phrase “common law censure” results in no California cases with that phrase.

Since there is no common law censure, the City and Scott Smith are fabricating a process that doesn’t exist, the City has no authority to create a process, and the City cannot proceed with a tool to humiliate when there is no penalty for the “crime” of censure.

To ensure proper due process, the City Attorney's Office recommends the following safeguards:

...

The Council should determine which member shall preside at the hearing and determine time allocations for each of the following steps:

...

The subject Councilmember ... should then be permitted to provide the subject Councilmember's responses or rebuttal to the concerns raised in the notice and presented at the hearing. ... have an allocation of time equal to the time allocated to the member(s) raising concerns. Such responses shall not be interrupted by other Councilmembers.

A censure proceeding is not a judicial proceeding ... The City Council acts as fact-finder ... City Councilmembers may ask questions of staff, each other, or speakers. However, non-Councilmembers with questions should raise them through the Council during their comment with a request that Council ask them as fact-finder at the conclusion of their comments.

Like resolutions generally, the censure resolution must be adopted by a majority vote of the Council.

We discussed procedure with Scott Smith before he drafted this arbitrary, one-sided, and capricious set of guidelines and/or rules. They are neither fair nor balanced, disregard our conversations, and deny due process.

1. The Council is not permitted to "determine which member shall preside." I told Scott Smith that Mayor Pro-Tem Ferguson would not be recusing herself and therefore, as Mayor Pro-Tem, she would be presiding. I informed him she could not be replaced and he agreed, then. He said, however, that the 3-member majority were permitted to overturn every one of her decisions. Maybe so, but none of her decision is not being Mayor Pro-Tem.
2. Based on the above, Mayor Pro-Tem Ferguson will chair the meeting, applying Rosenberg's Rules of Order pursuant to San Clemente Council Policy.
3. We agreed, or at least I thought we agreed, that the 3-member majority would present the 10 charges serially, one at a time Evidence would be required to prove each charge BEFORE Mayor Pro-Tem Ferguson or her counsel presented a defense.

4. As I informed Scott Smith, there are clear rules in the SCMC for all Administrative Hearings. SCMC 1.20.080. At a minimum, these rules set due process standards for administrative hearings. Those minimum standards include:
 - a. A hearing officer assigned by the City Manager, and the ability of Mayor Pro-Tem Ferguson to challenge that hearing officer.
 - b. At least 10-day notice prior to the hearing; 30-days is fairer as shown by the former ethics policy.
 - c. The right to call and cross-examine witnesses.
 - d. No time limit exists. Thus, the accused can spend the time needed to defend herself. This is called due process. Time cannot be limited unreasonably.

None of the above Due Process rights are mentioned or allowed.

5. The 3-member majority is required to present evidence (regardless of the standard for presenting evidence) of a censurable action/event, and only then will Mayor Pro-Tem Ferguson or counsel present a full defense to each charge. That is due process. At a minimum, the SCMC, even if not directly applicable to censure administrative hearing, sets forth similar minimum due process for minor infractions or fines which are far less serious (the amount involved could be \$10) than permanent humiliation.
6. Due process does not allow short notice, and then setting the hearing on a Thanksgiving week, when witnesses and attorneys are busy getting ready for the holidays and planning or actually travelling.

For all those reasons, Mayor Pro-Tem Ferguson's team cannot be limited by time in its defense.

For all those reasons, the hearing cannot proceed without a hearing officer.

For all those reasons, the hearing cannot take place until Mayor Pro-Tem Ferguson and her team have had at least 10 or up to 30 days to prepare and even then, she has a right to a continuance.

7. The current COVID-19 format of Council meetings does not comply with Due Process. Mayor Pro-Tem Ferguson has the constitutional right to confront her accusers. Yet the current format does not allow Mayor Pro-Tem Ferguson nor the

other fact-finder Council members to view the testimony. For this reason alone, the hearing must wait until the Council hearings allow attendance.

8. The COVID-19 format does not allow those testifying by email statements to be placed under oath. Yet this is the basic requirement of even quasi-judicial hearings. Every witness or person who testifies, including the attorneys and Council members must be required to take an oath to tell the truth. Yet this is not in Scott Smith's list of rules.
9. The Agenda Report lacks Due Process. It only presents pro-censure details and conclusions. Only one resolution, pro censure, is included. The City Attorney was required to consider that Mayor Pro-Tem Ferguson would not be censured. Instead, Scott Smith proceeded on the basis that Mayor Pro-Tem Ferguson was already tried and convicted. As I stated earlier, Scott Smith failed the fair and balance test required of all City Attorneys.

RECOMMENDED ACTION:

STAFF RECOMMENDS THAT Council convene the proceeding outlined in this Administrative Report and take any action it determines appropriate, including adopting Resolution No. 20-63 entitled "RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, CENSURING MAYOR PRO TEM LAURA FERGUSON FOR UNACCEPTABLE CONDUCT.

It doesn't get any more unfair than the above.

Who is "STAFF?" The Agenda Report is by the Interim City Manager. He initialed the Agenda Report, so at a minimum he read it. So, the STAFF must be the Interim City Manager. Making the recommendation to censure a Council member is beyond the duties of the Interim City Manager. The Council is his boss. Therefore, this is outright insubordination and possibly grounds for termination for cause. More importantly, it taints the finder of fact. Staff has informed the trier of fact it should take appropriate action, but only one action is mentioned, adopting a resolution censuring Mayor Pro-Tem Ferguson. Yet the Interim City Manager apparently makes that recommendation (or the City Attorney, see below) before ANY evidence is presented to anyone. What doesn't come to mind is Due Process.

In the alternative, STAFF may be the City Attorney. That may even be worse. He is not a fact finder. He is supposed to be a neutral. Yet he provides only a single resolution that oversteps the bounds of censure, and recommends adopting the very words he drafted. But it is actually worse yet. He pre-convicts Mayor Pro-Tem Ferguson of all 10 charges, without the benefit of hearing the evidence, if the evidence even exists, which it doesn't.

Scott Smith admitted that Mayor Pro-Tem Ferguson could not be censured for exercising First Amendment Rights. Yet many of the 10 charges are entirely based on exercising First

Amendment Rights. Scott Smith is aware of his text, and therefore that each of those charges cannot be sustained or proven.

Scott Smith fails to mention anywhere the Due Process violation that he included at least 4 finding regarding future conduct by or relating to Mayor Pro-Tem Ferguson. Yet the Notice fails to contain any discussion of the hearing including a trial on those issues. Those issues are not in the nature of censure. They are policy issues and not part of the Notice. They cannot be heard.

Scott Smith is well aware that the City cannot set pre-conditions on the speech and conduct of its Council members on the basis of a censure trial. But it didn't matter. How is the Fact Finder going to find that Mayor Pro-Tem Ferguson cannot do this or that in the future?

Again, where is the balanced legal advice?

Rules of Law and Evidence:

While we don't dispute that the formal rules of evidence do not apply, reasonable evidence rules do apply. But Scott Smith expects a censure hearing to proceed without determining what rules will apply. How are the attorneys for Mayor Pro-Tem Ferguson supposed to prepare without knowing the rules that apply?

More importantly here, the 4 Fact Finders must decide the law. Scott Smith failed to provide any list of the elements of the crime censure. To find against Mayor Pro-Tem Ferguson, for each of the 10 charges, the 4 Finders of Fact must find that Mayor Pro-Tem Ferguson violated all elements. Yet these Fact Finders will be required to look to Scott Smith for the elements. But Scott Smith has proven he is an advocate for the 3-member majority.

A google search for the "elements of censure" return no documents.

It is clear that without an ordinance, it is impossible for Mayor Pro-Tem Ferguson to have known what conduct is prohibited, and for the Fact Finders to make findings that the conduct rose to the level where censure is appropriate. Ex post facto demands this hearing not occur.

This also raises an even more important issue: Even if every fact confirms that Mayor Pro-Tem Ferguson did what the 3-member majority accuse her of, that does not mean that conduct qualifies for censure.

I refer you back to my bad breath analogy. Bad breath is not enough for censure. It does not arise to some required level of bad conduct. Or does it? That is the point. That is why the City Ordinance, not non-existent Common Law, must precisely provide the conduct that is not allowed and for which Mayor Pro-Tem Ferguson can be censured. Due Process demands this level of pre-charging definitions.

But now, given there is no definition of the law, the Fact Finders will have to do more than determine the conduct complained of occurred. Many of the charges are for interference by voicing her requests and opinions. That's improper" In what world? Not ours in the United States. Yet Council members, including Mayor Pro-Tem Ferguson, are permitted to interfere. What law prohibits the charged interference? None is cited by Scott Smith. Where is the line

between dissent and interference? That legal question is not answered. Council members have the right to free speech. They, by definition, are advocates. They dissent. They complain. They are elected to exercise oversight over the City Manager and the other Council members, not obedience. Independent judgment and oversight are what her oath of office requires.

But as long as Scott Smith, an advocate for the 3-member majority is present in his capacity as City Attorney, Due Process cannot, and will not, exist in this matter. His and Cristina Talley's presence taints any findings against the Mayor Pro-Tem. His presence presents a hostile judicial environment. His presence as the City Attorney is not allowed.

Inadequate Time to Prepare:

Not included on the list is the most fundamental due process requirement is sufficient time to prepare for the hearing.

Mayor Pro-Tem Ferguson has had less than 4 days to prepare. From the time of the Agenda Report, she has had only 3 days.

Due process does not allow the City to force a "quasi-judicial trial" before the person being "charged" has had reasonable time to prepare.

Here, with 10 claims against her, Mayor Pro-Tem Ferguson has only the weekend and Monday to prepare. Yet she has is a single working mother of two teenagers, has a full-time job in Encinitas, and works on Monday. Mayor Pro-Tem Ferguson will not have had sufficient time to meet with her attorneys to prepare a defense.

At the very least, the SCMC section 1.20.080 rules for Administrative Hearing, which would include a fine of \$1, sets out the minimum standards in the City of San Clemente, 10-day notice. But it also includes the right to a continuance. **Mayor Pro-Tem Ferguson demands a continuance.** So, given that Scott Smith argues that section 1.20.080 may not apply here, the material fact is that at the very least it sets the minimum standard for due process at a San Clemente Administrative Hearing. What are the standards.

1. At least 10-day notice. That did not happen here.
2. The person has the right to continue the meeting. We requested a continuance. The City refused. That did not happen here.
3. The right to a neutral hearing officer. That did not happen here.
4. A hearing officer that can be challenged. That did not happen here.
5. No time limit on presenting the case. That did not happen here.

For all those reasons, and because Cristina Talley and Scott Smith refuse to recuse themselves, and because the City refused a continuance, it is clear that any hearing will result in a lack of due process.

Brad Malamud

Attorney for Mayor Pro-Tem Ferguson

Campagnolo, Laura

From: Lee Miller [REDACTED]
Sent: Monday, November 23, 2020 10:32 AM
To: Campagnolo, Laura
Subject: Fwd: Censure

Good evening council,

The residents of San Clemente have a councilwoman who has had many years of experience working within our city, and that councilwoman is Laura Ferguson. We are at a time in our county when it has been shown that elected officials continually take advantage of their elected positions. It appears to me that everything councilwoman Ferguson is doing is trying to protect the residents of San Clemente from over spending and improper methods of doing city business. I am shocked that Councilwoman Ferguson's attorney will only be allowed 3 minutes to present a rebuttal to the many, and lengthy, allegations against her.

Thank you,

Lee A. Miller

Baade, Joanne

From: Kortney Morrow [REDACTED]
Sent: Monday, November 23, 2020 2:31 PM
To: Baade, Joanne
Cc: Ferguson, Laura; Hamm, Chris; Ward, Kathy; James, Gene; Sund, Erik
Subject: Public Comments for Tonight's Special Meeting

To the San Clemente City Council,

The City Council should NOT approve Resolution No. 20-63 that would censure Mayor Pro Tem Ferguson. I can think of no better way to waste money at a time of great economic despair in this city than the action that was taken to proceed with such a petty resolution.

This resolution on its face is nothing more than retaliation for Mayor Pro Tem Ferguson's belief in a more transparent and fiscally conservative policy by which she campaigned on and has consistently legislated inline with these principles. As someone who follows the city council meetings perhaps more than the average citizen, there has been a continual attack on Mayor Pro Tem Ferguson since she took seat on council. I do not always agree with her policy but respect her dedication to the cause of providing greater transparency in our local government.

The city council taking action on approving this Resolution is in direct conflict with what the voters supported when they elected Mayor Pro Tem for city council. It's not easy going against the status quo, but the voters voted for change and transparency when Ferguson and Bane were elected and that is what Ferguson has delivered. Learn to listen to one another, get your house in order, and stop spending money on frivolous actions that are nothing more than grandstanding.

Best regards,
Kortney Morrow
Resident of San Clemente

Beyer, Lori

From: Susan Nespor [REDACTED]
Sent: Monday, November 23, 2020 11:24 AM
To: CityClerk Mail
Cc: Ferguson, Laura; Baade, Joanne
Subject: Censure hearing 11-23-2020

Council:

Washington D.C. swamp politics appears to have reared its ugly head by the decision by Ward, Hamm and James to try and censure Laura Ferguson. I'm still shaking my head in pure disgust over the outrageous and vindictive behavior that I witnessed at last weeks CC meeting. To be witness to Kathy Wards tirade of accusations against Laura Ferguson and calling for Laura to be censured, supported by Gene James and Chris Hamm was watching 3 people hell bent on getting Laura Ferguson off city council. And why? In my opinion they, including Erik Sund and Scott Smith lack transparency and actually resent the fact that Laura is all about transparency! Laura ran on it and to work for the betterment of San Clemente and its residents!! Promises made promises kept! I suggest Ward and James start living up to the promises they ran on and stop wasting the taxpayers money on their personnel vendetta against Laura. There are many small businesses in San Clemente that are trying to hang on, due to the corona virus and the restrictions on their businesses that are constantly changing! I'm quite sure they would rather have council put the \$5,000+ towards helping them stay afloat as opposed to this Ward, Hamm and James circus show of a censure hearing! If Gene and Kathy are unable to check their egos and their hatred towards Laura at the door and get off their self righteous pedestals then I suggest they step down immediately!!!The same goes for Smith and Sund too!

Disgusted in San Clemente,

Susan Nespor

Please send a receipt that you received this email. Thank you!

Baade, Joanne

From: Baade, Joanne
Sent: Monday, November 23, 2020 10:59 AM
To: Toni Occhipinti
Cc: City Council Distribution
Subject: RE: The censorship of Laura Ferguson

This email confirms receipt of your below email, which is being provided to the City Council.

Joanne Baade
San Clemente City Clerk

From: Toni Occhipinti [REDACTED]
Sent: Monday, November 23, 2020 10:58 AM
To: CityClerk Mail <CityClerk@san-clemente.org>
Cc: Ferguson, Laura <FergusonL@san-clemente.org>; Baade, Joanne <BaadeJ@san-clemente.org>
Subject: The censorship of Laura Ferguson

Good evening Council,

I'm outraged after watching last Tuesday's Council meeting when Kathy Ward read her ridiculous letter attacking our Pro Tem Mayor, Laura Ferguson. To be specific, Kathy's letter claimed Ms. Ferguson should not be allowed to speak her mind on city issues and tried to portray her as being irresponsible for disclosing public information to the public.

Obviously Ms. Ferguson has her right to free speech and the expression of her professional objections, especially when it comes to sharing open city matters with its citizens. Further, it's our Council's duty, as a public leaders, to share concerns over potential issues and/or actions of our city, it's representatives and public servants.

Few items of the city should be shrouded from the citizens over which it governs. WE elect YOU and YOU serve US. You are held accountable to our scrutiny and the actions you take while representing our city is our right to know.

For example, tonight's special meeting is costing us an estimated \$5000. I ask you, if this was your personal money being used, would you be so quick and wasteful in it's being spent? Kathy called this meeting with support from Gene James and Chris Hamm, I question if the meeting would have been called or supported if the three of you were personally responsible for its expense? I expect not.

I would also like to bring to light and question the attorney of choice for whom we are being billed for tonight's session. Christine Talley, the attorney taking \$5,000 for a couple hours work this evening, was a former employee of BBK (Best, Best & Krueger) Attorneys. This seems to be a conflict of interest especially if our City Attorney, Scott Smith, is also in support of suppressing our city leaders speech while he himself is currently employed with the same firm, BBK Attorneys. Are we really going to get an unbiased and fair assessment from Ms. Talley? Was the opportunity for this session to put for any other capable attorney to pursue? And why do we continue to ally our city with a single attorney firm? Perhaps something we may consider with seriousness post this session.

I, and many citizens of San Clemente, would like to thank Laura for being the one to stand up, be vocal on what's happening in our city and share the actions of our council so we may assess them, their actions and results.

It's not easy to be the lone leader. We thank you Ms. Ferguson for your transparency and the time and effort you put into your posts. I know you love the city as much as we do.

I stand with Laura, "a solemn 'Aye'."

Toni O

Please send a receipt that you received this email. Thank you

Sent from my iPhone

Baade, Joanne

From: Baade, Joanne
Sent: Monday, November 23, 2020 9:27 AM
To: [REDACTED]
Cc: City Council Distribution
Subject: RE: Censuring Laura Ferguson

Mr. Ray:

This email confirms receipt of your below communication, which is being forwarded to members of the City Council.

Joanne Baade
San Clemente City Clerk

From: [REDACTED]
Sent: Sunday, November 22, 2020 4:52 PM
To: Baade, Joanne <BaadeJ@san-clemente.org>; Campagnolo, Laura <CampagnoloL@san-clemente.org>
Subject: Censuring Laura Ferguson

I was extremally disappointed when last Tuesday I watched 3 members of the city council vote to censure Laura Ferguson.

I've known Laura for over 10 years and she is a very hard working, ethical person with high morals and impeccable character.

I'm sure Laura's quest for more transparency and needed personnel changes within San Clemente City government is at the root of this push for censuring her.

With all of the important and challenging issues facing San Clemente, you'd think Gene, Kathy, and Chris would spend their time focused on finding solutions instead of wasting their time and upwards of \$5,000 of our limited financial resources on such a petty and vindictive stunt like censuring Laura Ferguson.

One must question their judgement if this is how they prioritize the important issues facing our city.

This latest action by these 3 members of our city council once again affirms the dysfunctional nature of our city council.

How embarrassing.

Mike Ray

Campagnolo, Laura

From: Susan Smith [REDACTED]
Sent: Monday, November 23, 2020 3:41 PM
To: Campagnolo, Laura; Ferguson, Laura; Ward, Kathy; James, Gene; Hamm, Chris
Cc: Ken Orr
Subject: Open Comment for Tonight's Special City Council Meeting

Dear Honorable Mayor Pro Tem Ferguson and All City of San Clemente Council Members:

Prior to Gene James' election to the council, the City Council under Dan Bane's leadership voted to illegally erect a homeless camp across from our homes. Erik Sund gave direction to unlawfully install cameras that looked into our backyards and inside neighbor's homes.

Laura was the only person who was willing to help us when the homeless camp and cameras were installed. She was the only person who was willing to question the City Manager and Assistant City Manager's UNLAWFUL actions of installing the cameras. **She was the only person willing to uphold the law and request to have them removed.**

All other active council members at that time supported an illegally placed homeless camp that cost our city nearly a Million Dollars in 2019 in needless litigation and operating fees.

Recently, there were permits wrongfully passed against the City's own Land Use Plan. Thankfully, every council member was willing to listen to our Appeal, but it was not without the cover up of all of the wrong doings. Instead, it was presented as though the city personnel, Development Management Team, and Planning Commission involved were thorough and accurate. All of us that are familiar with the situation know the comments were untruthful.

While we do not agree with all of Mayor Pro Tem Ferguson's actions, there have been many actions on behalf of ALL of the council members, Assistant City Manager, City Personnel, Planning Commission, Development Management Team, and others that have made decisions on behalf of our City that has put our City in the unfortunate position of litigation on multiple occasions. No one appears to have ever been held accountable for their actions in this City. Why now? Why single out Mayor Pro Tem Ferguson? It is wrongful for the City Council to be taking actions against one single person while letting other potential liabilities continue unabated. Please vote NO to the Censure of Mayor Pro Tem Laura Ferguson.

Thank you,
Susan Smith and Ken Orr

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Campagnolo, Laura

From: Jan Vandergast [REDACTED]
Sent: Thursday, November 19, 2020 11:13 AM
To: Campagnolo, Laura
Subject: censure

We do support the censure Tom and Jan

Campagnolo, Laura

From: Luz Villavicencio [REDACTED]
Sent: Sunday, November 22, 2020 3:22 PM
To: Baade, Joanne; Campagnolo, Laura
Cc: Luz Villavicencio
Subject: Public Comment, November 23rd Council Meeting – City of San Clemente

My name is Luz Villavicencio. I am the former Human Resources Analyst I/II. I served full time for 4 years until January of 2020.

I feel compelled to speak up and express my complete shock at the blatantly inflammatory and willful misrepresentation of material facts in this slanderous campaign against Laura Ferguson.

Ms. Ferguson couldn't have "interfered with" a City Manager's decision to hire a recruiter for the Deputy Public Works Director position because the City Manager never made that decision. I did that recruitment myself, in house. It was requisition 1819-00035. Erik Sund knows this, because he approved the requisition. That's just one example of a fabricated falsehood and three minutes is very little time to address other accusations I know to be lies.

If she ever expressed concern about spending tens of thousands of dollars in a recruiter, it was exactly what she needed to do and actually voicing the same concerns HR City staff had, including senior HR staff. We all knew those decisions were arbitrary and wasteful. I saw them hire a recruiter for a Building Official when the City had already successfully recruited one (Bill King) in house only three years prior. That requisition number is 1516-00030.

This council put a lot of work in these calumnies to feign concern about a City Manager doing his duty, when in fact, you have refused to interview and hire a permanent City Manager this whole year the position has been vacant, and in a year when the community needed leadership the most.

Makshanoff has been gone since January. Erik Sund is a disaster who just causes more problems so he doesn't count. And you are condemning Laura for disagreeing with the decisions of the interim City Manager when you yourselves chose not to extend his contract, so clearly you weren't that impressed with him either. And now, you've had an Acting City Manager without an Acting Assistant City Manager for months, so obviously you don't really need an Assistant City Manager, yet you are condemning Laura for pointing out an Assistant City Manager is not needed.

If you cared so much about how people are treated, you wouldn't have ignored the repeated pleas from rank and file employees to do something about how they are treated by the Assistant City Manager. You've had an employee survey, former employees speak at Council Meetings, and a newspaper publication calling you out on your indifference. You've had lawsuits and settlements, and you've done nothing.

This circus just looks like a personal vendetta and retaliation by fellow council members against Ms. Ferguson for having the courage to call you out on your lack of principle and your hypocrisy. Shame on you.

Baade, Joanne

From: Mike Winsten <mike@winsten.com>
Sent: Monday, November 23, 2020 12:02 AM
To: Ward, Kathy; Hamm, Chris; James, Gene; Ferguson, Laura; Scott Smith; ctalley@talleylawyers.com; Baade, Joanne
Cc: Brad Malamud
Subject: RE: URGENT - Another Brown Act Violation - Another Demand To Cure and Correct November 17, 2020, Agenda Item 9C and Subsequent Brown Act Violations
Attachments: 2020.11.22 - Another Brown Act Cure and Correct Letter.pdf

Please see and read the attached ASAP.

Thank you,

Mike Winsten

Michael S. Winsten
Winsten Law Group
Business and Trial Lawyers
28 Calle Castillo
San Clemente, CA 92673
Telephone: (949) 429-3400
Telecopier: (949) 429-3500
Mobile: (949) 633-5458
e-mail: mike@winsten.com
website: www.winsten.com

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From: Mike Winsten
Sent: Friday, November 20, 2020 12:30 PM
To: Ward, Kathy <wardk@san-clemente.org>; Chris Hamm <Hammc@san-clemente.org>; James, Gene <JamesG@san-clemente.org>; Ferguson, Laura <FergusonL@san-clemente.org>; Scott Smith <Scott.Smith@bbklaw.com>; ctalley@talleylawyers.com; baadej@san-clemente.org
Cc: 'Brad Malamud' [REDACTED]
Subject: URGENT - Brown Act Violation - Demand To Cure and Correct November 17, 2020, Agenda Item 9C Brown Act Violations
Importance: High

Please read and respond to the attached Brown Act Violation Cure and Correct letter which requires your immediate attention.

Thank you,

Michael S. Winsten

Michael S. Winsten
Winsten Law Group
Business and Trial Lawyers
28 Calle Castillo
San Clemente, CA 92673
Telephone: (949) 429-3400
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November 22, 2020

San Clemente City Council

Mayor Pro Tem Laura Ferguson – By email: fergusonl@san-clemente.org

Councilmember Kathy Ward – By email: wardk@san-clemente.org

Councilmember Chris Hamm – By email: hammc@san-clemente.org

Councilmember Gene James – By email: jamesg@san-clemente.org

City Clerk Joanne Baade – By hand delivery; Telecopier: (949) 361-8309 &

San Clemente City Hall email: cityclerk@san-clemente.org & baadj@san-clemente.org

910 Calle Negocio

San Clemente, CA 92673

Scott C. Smith, Esq., City Attorney – scott.smith@bbklaw.com

Best, Best and Krieger

18101 Von Karman Ave., Suite 1000

Irvine, CA 92612

Cristina Talley, Esq., Deputy City Attorney – By email: ctalley@talleylawyers.com

Talley & Talley Law, APC

23461 S. Pointe Drive, Suite 310

Laguna Hills, CA 92653

Re: Demand For Immediate Action To Cure and Correct Brown Act Violation(s) of Government § 54954.2 re Discussion and Action on Items Not On The Agenda During November 17, 2020 during discussion on Agenda Item 9C including a Vote to set a Hearing to Censure Mayor Pro-Tem Ferguson on November 23, 2020, and to take the Censure Hearing Off-Calendar from November 23, 2020 Special Meeting

Dear Mayor Pro Tem, City Councilmembers, City Clerk, City Attorney, and Deputy City Attorney:

As noted in my November 20, 2020, letter, my co-counsel Brad Malamud and I represent an interested person, Mayor Pro Tem Laura Ferguson. Please direct all communications in response to this letter directly to both of us.

We are writing to demand that the City immediately cure and correct unbelievable violations of the Brown Act that occurred during the November 17, 2020, City Council meeting, which at this point are being perpetuated in the Special Meeting called yesterday November 21, 2020, for November 23, 2020. These violations occurred during the discussion of Agenda Item 9C or more accurately, in lieu of Agenda Item 9C. The censure hearing and actions proposed to be taken at the November 23, 2020, are the fruits of the poisonous tree planted during Agenda Item 9C at the November 17, 2020, City Council meeting with Mr. Malamud and I have addresses in separate letters previously delivered to all of you. Rather than repeat the content of those letters, I will simply incorporate their contents into this letter.

By way of background, the City original called and noticed an Adjourned Regular Meeting for November 23, 2020, setting forth the same agenda item and staff report as is now set forth in the November 21, 2020, Special Meeting Notice, which states on its face that the Special Meeting replaces the Adjourned Regular Meeting called on November 20, 2020, for November 23, 2020. The reasons for replacing the Adjourned Regular Meeting for the Special Meeting are because the Adjourned Regular Meeting notice was defective since it was a notice of a continued meeting but added a new agenda item, to which Mr. Malamud and I objected in a telephone conference call with City Attorney Scott Smith yesterday. Substituting the Special Meeting Notice for the Adjourned Regular Meeting notice does not cure the foundational problem that permeated the November 17, 2020, meeting, The Special Meeting Notice contains the same illegal agenda item that flows from the improper November 17, 2020, meeting.

In addition to the grounds raised in our previous cure and correct demand letters, I want to address, again, how it is impermissible to go forward with a censure proceeding without a prior policy and procedure in place.

In *Richard v. City of Pasadena*, 889 F. Supp 384 (C.D. Cal. 1995), a Pasadena City Council member was censured for his allegedly abusive language and rude behavior towards city staff. The censure was based on an ethics and censure policy enacted as an Ordinance. After the censure, the plaintiff continued on with the conduct the majority found objectionable. The majority censured the plaintiff again. The plaintiff and two of his constituents then filed a lawsuit contesting the constitutionality of the Ordinance under which he was censured. The plaintiff alleged the ethics and censure policy was unconstitutionally vague on its fact and as applied to plaintiff on the grounds that it burdened, penalized, and chilled plaintiffs' right to free expression and to petition the government for redress of grievances.

During the pendency of the case, the City voluntarily acknowledge the offering Ordinance was indefensible and repealed and replaced the offending Ordinance. The resolution doing so acknowledged the offending ordinance could not withstand a facial challenge. The plaintiffs then filed a motion for attorney's fees as the prevailing parties. the District Court found in favor of the plaintiffs as the prevailing parties, finding the offending ethics policy ordinance was indeed both vague and overbroad on its face and granting the plaintiffs' motion for attorneys' fees and costs. The District Court noted:

"Plaintiffs unequivocally challenged the vagueness and overbreadth of Ordinance No. 6503 and sought declaratory and injunctive relief to invalidate it and prevent its enforcement. The resolution completely eliminated the possibility of using the ordinance to censure speech, thus assuring that any future efforts to censure Richard (or anyone else) would have to be based strictly on prohibited conduct." (889 F.Supp.390)

The District Court then cited District Judge Tashima in explaining why it agreed it agreed that plaintiffs were the prevailing parties:

"Judge Tashima recently reviewed the concerns that led to the "vagueness doctrine":

In the area of expressive conduct, vague laws offend several important values: (1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Finley v. National Endowment For the Arts*, 795 F.Supp. 1457, 1471 (C.D.Cal.1992) (citations omitted). A statute must be defined clearly enough "so as not to cause persons of common intelligence — necessarily to guess at its meaning and to differ as to its application." *Id.*, quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). As the Supreme Court stated more recently, "the question is not whether discriminatory enforcement occurred here ... but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051, 111 S.Ct. 2720, 2732, 115 L.Ed.2d 888 (1991).

Plaintiffs identified numerous reasons why Ordinance No. 6503 is unconstitutionally vague. First, no term or phrase contained in the ordinance is even defined in the law itself or elsewhere (with the exception of "motion to censure"). Words like "courteous," "responsive," and "impartial" are thus open to limitless varieties of interpretation. Second, "the standards set forth in the ordinance were entirely subjective in their construction, and plainly lent themselves to interpretations restrictive of speech." For example, in protecting only "courteous" expression of opinions or minority points of view, the Ordinance necessarily required members to make content-based distinctions regarding an offending member's speech according to their personal values.

In addition, plaintiffs contend that the various responsibilities listed in subsection A of the Ordinance readily encompass expression, for example, "performing responsibilities in a manner that is efficient, courteous, responsive and impartial," "seeking, in making decisions, the overall public good," and "serving as a communicator between the community and the city." The lack of definitions combined with the implicit acknowledgement in subsection C that discourteous speech most certainly was intended to be suppressed by the Ordinance, renders the Ordinance unconstitutionally vague because it "subjects the exercise of the right ... to an unascertainable standard." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971) (ordinance prohibiting individuals from assembling "in a manner annoying to persons passing by" was vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.") Plaintiffs' challenge of Ordinance No. 6503 on vagueness grounds was "not frivolous,

unreasonable or groundless." *Doty*, 37 F.3d at 548.

Plaintiffs also attacked Ordinance No. 6503 as overbroad. The test is "whether the enactment reaches a substantial amount of constitutionally protected conduct." *City of Houston, Texas v. Hill*, 482 U.S. 451, 458, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987), quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *Kolender v. Lawson*, 461 U.S. 352, 359, n. 8, 103 S.Ct. 1855, 1859, n. 8, 75 L.Ed.2d 903 (1983). Plaintiffs argue persuasively that the ordinance's lack of definitions and use of judgment-laden terms directly threatens political speech. "Courteous" expression is very much a matter of personal opinion. And it takes little imagination to foresee that in a political setting, opinions that one disagrees with can readily become "discourteous expression" the moment they are uttered. Plaintiffs' quotation of Justice Harlan in *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) is on point:

Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." (889 F. Supp. 391-392)

There is no "censure exception" to what District Judges Tashima and Paez wrote above. Here, the City of San Clemente has no written policy or procedure or ordinance prescribing what conduct is allowed to be censured. The teaching of Richard is that if an unconstitutionally vague and overbroad Ordinance couldn't support a censure proceeding, how can the complete absence of a censure policy, procedure or ordinance support a censure proceeding. It can't. The City Council majority's plan to keep proceeding on this ill-advised censure proceeding is based entirely on pursuing viewpoint-based and content-based charges based on statements and conduct protected from restriction by the 1st Amendment. The majority and all of those acting in concert with them are violating Mayor Pro Tem's 1st Amendment free speech rights, for which there are serious legal consequences. The City Attorney's mantra that there are "common law censure rules" is a blatant misrepresentation or represents a complete and fundamental lack of understanding of 1st Amendment due process requirements in this area.

I'm surprised and disappointed that the City Attorney has let this matter get this far despite being well briefed on the law by Mr. Malamud and me. The Brown Act issues are straight forward and indefensible. The Constitutional issues are first year law school Constitutional Law. None of this is very complicated. The City can't proceed any censure proceeding without first adopting a constitutionally compliant censure policy, procedure or ordinance that advises the affected persons and the public in advance of what is and is not censurable (i.e. substantive due process), and how the censure process is to be adjudicated in compliance with constitutional due process rights (i.e. procedure due process). With the

exception of the Mayor Pro Tem, you all keep forgetting about the public's rights to be informed in advance of all government action so they can comment or respond any way they wish. The Brown Act is not to protect the Mayor Pro Tem in particular, although she is absolutely entitled to its protections; it was enacted to protect the public's rights in open transparent government.

On Friday, November 20, 2020, two days ago, the Eleventh Circuit Court of Appeals issued its opinion in *Otto v. City of Boca Raton*, No. 19-10604, November 20, 2020 (11th Cir.), striking down an Ordinance regulating conduct of psychotherapists. In so doing, it provides guidance, non-negotiable, binding rules, which include City Council members, when the government is prohibited from restricting free speech:

“Viewpoint-based regulations like these are “an egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). **Indeed, there is an argument that such regulations are unconstitutional per se; the Supreme Court has said that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”** *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (emphasis added). **A content-based law is one that “applies to particular speech because of the topic discussed or the idea or message expressed.”** *Reed*, 576 U.S. at 163. **Few categories of regulation have been as disfavored as content-based speech restrictions, which are “presumptively invalid.”** *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). **That’s because, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”** *Mosley*, 408 U.S. at 95. **But speech does not need to be popular in order to be allowed. The First Amendment exists precisely so that speakers with unpopular ideas do not have to lobby the government for permission before they speak. ...The “point of the First Amendment,” however, “is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”**

In addition to the systemic Brown Act violation permeating this process, the City is violating the 1st Amendment. There is no exception for regulating the speech of election officials, which in turn violates their constituents right of representation, another topic you have all ignored with the exception of the Mayor Pro Tem. Please do the right thing and stand down before this matter escalates elsewhere, including the courthouse.

Demand is hereby made, again, that the City Council cure and correct its violations of Government Code Section 54954.2 by immediately taking the November 23, 2020, censure hearing off calendar. The City Council must also provide a prompt written unconditional commitment that it will to cease and desist from, and not repeat, the actions constituting this violation. This unconditional commitment must be approved by the legislative body in open session at a regular or special meeting as a separate item of business, not on the consent calendar, and must be in substantially the form set forth in Section 54960.2(c)(1).

The City's failure to comply with this demand by taking the November 23, 2020, hearing off calendar will result in legal action for injunctive and all other appropriate relief under the Brown Act and all applicable laws, including the 1st Amendment and 42 USC Section 1983 to declare the actions taken on November 17, 2020, under the guise of Agenda Item 9C, and all those that take place on November 23, 2020, and thereafter, illegal, null and void, and for injunctive relief enjoining the majority City Council members and all their agents and those acting in concert with them, including, but not limited to, the City Attorney and "conflicts" counsel, from repeating these wrongful actions ever again, and an award of attorneys' fees and costs under Government Code § 54960.5 and all other applicable laws.

Mike Winsten can be reached by telephone at: (949) 633-5458 or by email at: mike@winsten.com to confirm your receipt and immediate compliance with this demand. Brad Malamud can be reached by telephone at: (949) 212-2834 and by email at: brad@malamuds.com.

Very truly yours,

WINSTEN LAW GROUP

/s/ Michael S. Winsten

Michael S. Winsten

Baade, Joanne

From: Mike Winsten <mike@winsten.com>
Sent: Friday, November 20, 2020 12:30 PM
To: Ward, Kathy; Hamm, Chris; James, Gene; Ferguson, Laura; Scott Smith; ctalley@talleylawyers.com; Baade, Joanne
Cc: Brad Malamud
Subject: URGENT - Brown Act Violation - Demand To Cure and Correct November 17, 2020, Agenda Item 9C Brown Act Violations
Attachments: 2020.11.20 - Winsten Cure and Correct Brown Act Violation LT City of San Clemente.pdf
Importance: High

Please read and respond to the attached Brown Act Violation Cure and Correct letter which requires your immediate attention.

Thank you,

Michael S. Winsten

Michael S. Winsten
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Business and Trial Lawyers
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WINSTEN LAW GROUP
BUSINESS & TRIAL LAWYERS

November 20, 2020

San Clemente City Council

Mayor Pro Tem Laura Ferguson – By email: fergusonl@san-clemente.org

Councilmember Kathy Ward – By email: wardk@san-clemente.org

Councilmember Chris Hamm – By email: hammc@san-clemente.org

Councilmember Gene James – By email: jamesg@san-clemente.org

City Clerk Joanne Baade – By hand delivery; Telecopier: (949) 361-8309 &

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Laguna Hills, CA 92653

Re: Demand For Immediate Action To Cure and Correct Brown Act Violation(s) of Government § 54954.2 re Discussion and Action on Items Not On The Agenda During November 17, 2020 during discussion on Agenda Item 9C including a Vote to set a Hearing to Censure Mayor Pro-Tem Ferguson on November 23, 2020, and to take the Censure Hearing Off-Calendar

Dear Mayor Pro Tem, City Councilmembers, City Clerk, City Attorney, and Deputy City Attorney:

My co-counsel Brad Malamud and I represent an interested person, Ms. Laura Ferguson, who is the San Clemente Mayor Pro-Tem, citizen, taxpayer, registered voter, and resident in the City of San Clemente. Mr. Winsten is also a citizen, taxpayer, registered voter, homeowner, and resident in the City of San Clemente. Mr. Malamud is a business owner in San Clemente.

We are writing to demand that the City immediately cure and correct unbelievable violations of the Brown Act that occurred during the November 17, 2020, City Council meeting. These violations occurred during the discussion of Agenda Item 9C or more accurately, in lieu of Agenda Item 9C. Please direct all communications in response to this letter directly and us.

Agenda Item 9.C. stated *verbatim* as follows:

C. Process and Grounds for Possible Censure of Councilmember(s)
Pages 9C-1 through 9C-2

Report from the City Attorney concerning process and grounds for possible censure of Councilmember(s).

Staff Recommendation

Consider process and grounds for possible censure of Councilmember(s) and provide any direction Council deems appropriate.

The City Manager's Department - City Attorney Agenda Report lays out some (but notably, and curiously, not all) of the guidelines from case law and elsewhere on a City Council's ability to censure its own members. It concludes with the following Recommended Action:

STAFF RECOMMENDS THAT the City Council consider process and grounds for possible censure of Councilmember(s) and provide any direction Council deems appropriate.

The plain meaning of the agenda item listed was to hold a discussion that could lead to the City Council providing directions to staff, after a discussion of options and their pro's and con's, etc., to identify grounds for a censure and to develop a process, i.e. a policy and procedure and grounds for possible Councilmember censures.

The plain language of the agenda item did not state that City Council would actually commence a (pre-planned)¹ censure action against Mayor Pro Tem Ferguson in what constituted a 'surprise attack.'

Agenda Item 9C and the Agenda Report did not mention setting a date for a censure hearing date, any action or discussion of any conduct by an individual City Councilmember, the reading of charges against a specific City Councilmember, and/or the discussion about the setting of hearing date for those charges which date would expedite a hearing in violation of the 10 day notice requirement for administrative hearings contained in the San Clemente Municipal Code and the requirement of due process. Nowhere does the Agenda item description nor the Agenda Report state that during the November 17, 2020 Council meeting that:

- City Councilmember Ward would read a long list of prepared charges against Mayor Pro Tem Ferguson;

¹ It is clear the action was pre-planned as Cristina Talley, Esq., who is designated as Counsel for the majority Council members, would not have been present and would not have been majority counsel for an item that was not described nor for which a majority even existed at the time of the hearing on Item 9C. This is further proof that the Brown Act violation was knowing, planned, and carried out with the assistance of staff and/or attorneys.

- that outside “conflicts” counsel, Cristina Talley, Esq., (or as she informed Mr. Malamud on November 20, 2020, “counsel for the majority Council members”) had already been retained for this specific purpose and was attending the meeting; and
- that there had obviously been a discussion between Ms. Ward, the City Attorney, Cristina Talley, Esq., “conflicts” counsel, and likely including Councilmembers Hamm and James. If the three Councilmembers met jointly, or if they discussed these issues through “serial” meetings, that would be another Brown Act violation.²

Agenda Item 9C and its Agenda Report only talk in generalities about having a discussion for developing a censure policy and procedure. This makes sense since there is no Municipal Code Ordinance on censure and because the City Council does not presently have a written policy or procedure on what grounds might support a censure and what the procedures would be to carry out a censure proceeding and hearing.

Instead, Agenda Item 9C was used as a ‘surprise attack’ on Mayor Pro Tem Ferguson, and the public, to initiate a hearing, a specific censure proceeding against her, in violation of Government Code Section § 54954.2

There are two key provisions of the Brown Act which ensure the public’s business is conducted openly. First, that legislative bodies publicly post agendas prior to their meetings, (Government Code §§ 54954.2, 54955, 54956 and 54957.5). Second, that no action or discussion may occur on items or subjects not listed on the posted agenda (Government Code § 54954.2). The limited exceptions to the rule against discussing, or taking action, not on a posted agenda are not applicable here.

Agendas must contain a brief general description of each item of business to be transacted or discussed at the meeting. § 54954.2(a). The description should inform the public of the “essential nature” of the matter, but need not, but may, exceed 20 words. *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal. App. 5th 637. The *San Diegans for Open Government* case provides an example of a sufficient agenda description that provides fair notice.

In *San Diegans for Open Government*, the Oceanside City Council approved a subsidy agreement with a hotel developer using the following agenda item description:

Adoption of a resolution to approve: 1. An Agreement Regarding Real Property (Use Restrictions) between the City of Oceanside and SD Malkin Properties Inc. to guarantee development and use of the property as a full service resort consistent with the entitlements for the project; 2. An

² These actions violated Government Code § 54954.2(b)(1): “(b) (1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item that is within the subject matter jurisdiction of the legislative body.”

Agreement Regarding Real Property to provide a mechanism to share Transient Occupancy Tax (TOT) generated by the Project; 3. A Grant of Easement to permit construction of a subterranean parking garage under Mission Avenue; 4. A report required by AB 562 prepared by Paul Marra of Keyser Marston and Associates documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy, the amount of the tax revenue and jobs generated by the project; and 5. A License Agreement to permit construction staging for the project on a portion of Lot 26.

The *San Diegans for Open Government* court ruled that this agenda description complied with the requirements of Government Code Section 54954.2 because the agenda description expressly gave the public notice that the council would consider a fairly substantial development of publicly owned property as a hotel, that the City would share the transient occupancy tax generated by the project and that the transaction would involve a subsidy by the City. Additional information, while helpful, was not necessary to provide fair notice of the essential nature of the action under state law. The court found that the language of the agenda, considered as a whole, provided more than a "clue" that the City planned to provide the developer with a substantial and ongoing financial subsidy in exchange for the project.

In contrast, in *Hernandez v. Town of Apple Valley* (2017) 7 Cal. App. 5th 194, the court held that the Apple Valley Town Council's agenda description was insufficient. There, the Apple Valley Town Council adopted three resolutions that called for a special election related to an initiative to adopt a commercial specific plan and the filing of arguments and rebuttal arguments for and against the initiative. In addition, the Town Council adopted a Memorandum of Understanding ("MOU") that authorized the acceptance of a gift from an interested party, Wal-Mart, to pay for the special election. The agenda description for the matter read "Wal-Mart Initiative Measure" and included a recommendation for action that read "[p]rovide direction to staff."

The *Hernandez* court reiterated that the Brown Act requires that each item of business be placed on the agenda. Specifically, the court highlighted that nothing in the agenda description, or even in the agenda packet, indicated that the Town Council was going to consider an MOU to accept a gift from Wal-Mart to pay for a special election to pass the initiative. The court concluded that the City violated the Brown Act by omitting the MOU from the agenda description because the omission meant that the plaintiff was given no notice of the item of business.

It is no different here. Just like the agenda item the Court disapproved in *Hernandez*, Item 9C did not mention discussion of an individual Councilmember, here Mayor Pro-Tem Ferguson (similar to the MOU), nor did the item mention that Council would discuss and vote to set a censure hearing date where a single Councilmember would have to defend herself from the censure charges. In fact, neither the Agenda description and the Agenda Report did not mention Mayor Pro-Tem Ferguson by title or name (anywhere) and no mention was made of any discussion or vote to set a hearing date. This action that took place under the guise of Item 9C clearly violated the Brown Act.

The Brown Act ensures the public's business is conducted openly by restricting a legislative body's ability to deviate from posted agendas. The City Council is a legislative body under the Brown Act. The statute affords a legislative body limited authority to act on or discuss non-agenda items at regular meetings, but none of those exceptions apply, nor were they properly invoked.

A legislative body may not act on, or discuss, any item that does not appear on the agenda posted for a regular meeting. (Government Code § 54954.2.)

The Agenda Item 9C and the events that transpired under the guise of Item 9C do not comply with Section 54954.2. There was no good faith substantial compliance. There was only bad faith willful non-compliance and sneakiness that does not pass muster under the spirit, intent, or letter of the Brown Act. Therefore, the actions taken are null and void and must be immediately cured and corrected.

Demand is hereby made that the City Council cure and correct its violations of Section 54954.2 by immediately taking the November 23, 2020, censure hearing off calendar. The City Council must also provide a prompt written unconditional commitment that it will to cease and desist from, and not repeat, the actions constituting this violation. This unconditional commitment must be approved by the legislative body in open session at a regular or special meeting as a separate item of business, not on the consent calendar, and must be in substantially the form set forth in Section 54960.2(c)(1).

The City's failure to comply with this demand by taking the November 23, 2020, hearing off calendar, ideally before the agenda is released later today so the public will have ample notice, will result in legal action for injunctive and all other appropriate relief under the Brown Act and all applicable law to declare the actions taken on November 17, 2020, under the guise of Agenda Item 9C, and all those that take place on November 23, 2020, illegal, null and void, and for injunctive relief enjoining the City Council and all its agents, including, but not limited to, the City Attorney and "conflicts" counsel, from repeating these wrongful actions ever again, and an award of attorneys' fees and costs under Government Code § 54960.5.

Mike Winsten can be reached by telephone at: (949) 633-5458 or by email at: mike@winsten.com to confirm your receipt and immediate compliance with this demand. Brad Malamud can be reached by telephone at: (949) 212-2834 and by email at: brad@malamuds.com.

Very truly yours,


Michael S. Winsten

Campagnolo, Laura

From: Martina W [REDACTED]
Sent: Sunday, November 22, 2020 9:18 PM
To: Campagnolo, Laura
Subject: The Lynching of Laura Ferguson ; 11/23/2020

(I would like this read at the special council meeting).

San Clemente has yet again become a subject of water cooler conversation and bemusement; after 'Fence Gate' and what became the viral story about plowing in the skate park, (like sands in the bowl, these are the COVID days of our lives) we have now sunk to a new all time low.

I wish mere words could convey how thoroughly I am disgusted by all of this, but I will give it a try .

This is a show trial, a kangaroo court, a farce, a travesty, a waste in government resources that in time will have the same posthumous vindication seen in the Salem Witch trials.

The audacity for this city and council to try and censure Laura is a cautionary tale to all of us.

Should a council member who voted to get rid of the city's ethics policy be the face of this fiasco? Or is it fitting ?

If the city and the people were so keen to censure city council members , why not start with Kathy Ward? Does everyone forget her being the 'inside source:' to the OC Weekly on the hit piece on Dan Bane, only a short time before the 2016 election.

Does everyone forget her using her personal FB page to disseminate the false allegations within that ? Does everyone forget her attacking citizens and falsely accusing them of being 'assigned to promote certain council candidates?

Does everyone remember when Kathy was up for reelection in 2016, yet the city decided to have a No TROLL ROAD forum , when Kathy who was on the TCA board was designated as a speaker, while other candidates such as Dan Bane were limited to being outside? It took citizens writing correct and cure letters to remedy this.

Does everyone remember the NUMEROUS Brown Act Violations by the city and council , such as ordering the removal of people they found disruptive without giving them a cautionary warning ?

Does everyone remember Kathy Ward filing a police report against a local activist , 10 months after an action that didn't even directly involve her?

Does everyone remember , council, (with the exception of Laura) sitting quiet when all of a sudden the city decided to change the 'rules', and had the sheriff (deputies) order everyone out of council chambers and would only allow them re-entry if they swore some sort of pathetic oath?

Let's also turn a blind eye to lame duck council member Chris Hamm, and when I say blind eye, what I really mean is if you blink you will miss him; since it's almost like he doesn't really exist hence the name

BigFoot. Why is it only after Covid, he has a fairly stellar attendance at council meetings; but ALWAYS and curiously has his camera turned off? Where is he? And who is paying for it?

Let's not forget Gene, best known for parking his truck up against a homeless man's tent ; but in other concerning behaviors, he threatened to use the sheriff's department to intimate private citizens get information out of them. And this is just the short list.

In closing, I think the city should have a new motto.

Never Complain, Never Explain