

From: Brad Malamud [REDACTED]

Sent: Tuesday, January 30, 2024 3:42 PM

To: Cabral, Victor <CabralV@san-clemente.org>; Enmeier, Mark <EnmeierM@san-clemente.org>; Knoblock, Steve <KnoblockS@san-clemente.org>; Loeffler, Rick <LoefflerR@san-clemente.org>; Duncan, Chris <DuncanC@san-clemente.org>; Elizabeth A. Mitchell <emitchell@bwslaw.com>; Hall, Andy <HallA@san-clemente.org>; Campagnolo, Laura <CampagnoloL@san-clemente.org>; C. Jayden Smith <cjsmith@picketfencemedia.com>

Subject: Brown Act and Government Code violation by City - Correct and Cure Letter

To: City Council and City Officials of the City of San Clemente: Mayor Cabral, Councilmembers Enmeier, Duncan, Knoblock, and Loeffler, City Attorney Mitchell, City Manager Hall, and City Clerk Campagnolo

To: City of San Clemente, San Clemente City Councilmembers, City Clerk, City Manager, and City Attorney:

January 30, 2024

Dear Mr. Cabral, Mr. Enmeier, Mr. Duncan, Mr. Knoblock, Mr. Loeffler, Ms. Mitchell, Mr. Hall, and Ms. Campagnolo.

This letter is being sent on behalf of multiple residents who wanted me to send this letter to City of San Clemente and its Officials in order to have the City correct its illegal/improper decision to restrict the public's right to address the City Council on each and every issue listed on the Council's Agenda. At this time, those members of the public shall remain anonymous.

This letter has multiple purposes.

The first is to point out the problems with the passage of Resolution 24-13 on a technical basis, i.e. no enabling change to Council Policy and Procedure ("Policy and Procedure") 1201-11 was included as the Agenda Report failed to include the referenced "Exhibit 1."

The second, assuming the City disagrees and believes it properly implemented changes to Council Policy and Procedure 1201-11, is to issue a Cure and Correct Letter required prior to filing a lawsuit under California law.

1. Failure to Modify Policy and Procedure 1201-11 due to not including the referenced Exhibit 1.

At the outset, given the passage of Resolution 24-13, the City adopted changes to Council Policy and Procedure 1201-11 in spite of the following issue.

The Agenda Report (10C) was intentionally misleading because the name of one of the two authors was not identified. Mr. Hall and Ms. Campagnolo are listed as co-authors. This is not true. Mr. Hall stated that the Item 10C Agenda Report was not drafted by him, but instead was drafted by Laura Campagnolo and City Attorney Elizabeth Mitchell. I have no way of knowing the truth; but believe Mr. Hall.

This is more than a lack of transparency and is difficult to understand. While Mr. Hall indicated that the software would not allow Ms. Mitchell to be identified in the author field, an explanation of that limitation/restriction along with the proper authors could have been disclosed elsewhere in the Agenda Report. The free-form narrative allows for any comments/statements and clarifications. Thus, there was an intentional decision to mislead and/or lie to the public. Worse yet, it was done with the full knowledge of the City's City Attorney who by contract is required to review Agenda Reports prior to the Council meeting, and here, was an unidentified author.

The residents are owed a full investigation/explanation of this failure to disclose, and anyone who intentionally misled the public should be considered by the Council for termination, sanctions, or other corrective action.

Moving on to the the passage of Resolution 24-13.

Regardless of whether Item 10C (Agendized and voted during the January 16, 2024, meeting) was a violation of the Government Code and Brown Act, the provision(s), language, or document that are necessary to describe the modification(s) to Policy and Procedure 1201-11 were missing from the Agenda Report. For that reason, the 3 - 2 vote to approve Resolution 24-13 did not adopt any changes to Policy 1201-11. Below is a further explanation of the failure of Resolution 24-13 to adopt changes to Policy and Procedure 1201-11.

Resolution No. 24-13 states in part:

"... is hereby **amended as indicated in Exhibit 1** to this resolution, which is hereby incorporated fully by the reference ..." (emphasis added.)

Thus, the Council voted 3 – 2 to approve Exhibit 1 being incorporated into Council Policy and Procedure 1201-11.

Any changes to Council Policy and Procedure 1201-11 were specifically incorporated into the Resolution 24-13 only and specifically via an attachment, "Exhibit 1."

Yet, Exhibit 1 does not exist and was not included in Agenda Item 10C.

Therefore, no changes were actually adopted without some fancy explanation by someone. Even then, words have meaning. This mis-reference to Exhibit 1 rather than Attachment 1, was a fatal failure. But for purposes of this letter, it is assumed the City disagrees.

Instead of Exhibit 1, the Agenda Report includes "Attachment 1" beginning on page 4 of the Agenda Report and ending on page 15 (11 pages). Attachment 1 was not approved in Resolution 24-13 as a replacement for Exhibit 1 and on that basis cannot be used in the place of Exhibit 1.

In the Agenda Report, Attachment 1 was placed before discussion of Resolution 24-13, which resolution was described as "ATTACHMENT 2."

On the above basis, the City did not legally adopt any changes to Council Policy and Procedure 1201-11 unless some explanation of why Attachment 1 and Exhibit 1 are interchangeable. To date, no such explanation has been provided by the City to justify adopting Attachment 1 as Exhibit 1.

This letter proceeds on the basis that the City disagrees for purposes of the Correct and Cure Letter. If the City agrees with this analysis, please let me know.

Moving on to the Cure and Correct portion of this letter:

2. Cure and Correct Resolution 24-13 and Policy and Procedure 1201-

11

As stated above, this section of the letter is based on the City taking the position that approval of Resolution 24-13 effectuated changes to Policy and Procedure 1201-11 (based on Attachment 1 being substituted in the place of Exhibit 1).

CURE AND CORRECT:

This letter is a **Cure and Correct letter** regarding approval on or about January 16, 2024, of Resolution 24-13 and the related modification to Council Policy and Procedure 1201-11.

The changes to Policy and Procedure 1201-11 result in limiting a speaker to a single 3-minute presentation to the Council for all items (there is no debate that more than one item is included in the Consent Calendar for a single vote unless one or more of those items are pulled for separate discussion now for the first time only by Council members rather than the previously allowed pulling of an item by any member of the public) included on the Agenda under the Consent Calendar.

This new limitation is a violation of the Government Code which, as described below in detail, allows a public speaker to address the Council, separately, for each item on the agenda. No exception appears in the Government Code for Consent Calendar items being combined as a single item.

By way of background, numerous residents and I emailed and/or spoke to Council about this issue in advance of the vote.

A Cure and Correct demand letter is required under the Brown Act when a legislative body has taken an action that needs to be corrected. Government Code § 54960.1(a) provides, in part:

(a) The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.

(b) Prior to any action being commenced pursuant to subdivision (a), the district attorney or interested person shall make a demand of the legislative body to cure or correct the action alleged to have been taken in

violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5. The demand shall be in writing and clearly describe the challenged action of the legislative body and nature of the alleged violation.

(c)(1) The written demand shall be made within 90 days from the date the action was taken unless the action was taken in an open session but in violation of Section 54954.2, in which case the written demand shall be made within 30 days from the date the action was taken.

(2) Within 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action.

(3) If the legislative body takes no action within the 30-day period, the inaction shall be deemed a decision not to cure or correct the challenged action, and the 15-day period to commence the action described in subdivision (a) shall commence to run the day after the 30-day period to cure or correct expires.

(4) Within 15 days of receipt of the written notice of the legislative body's decision to cure or correct, or not to cure or correct, or within 15 days of the expiration of the 30-day period to cure or correct, whichever is earlier, the demanding party shall be required to commence the action pursuant to subdivision (a) or thereafter be barred from commencing the action..

Councilmember Enmeier confirms that the reason for Resolution 24-13 was to prohibit public involvement and limit speech on all Consent Calendar items to only 3-minutes in total, per person. The following email is evidence.

From: Enmeier, Mark <EnmeierM@san-clemente.org>

Date: Wed, Jan 17, 2024 at 9:27 PM

Subject: Re: 10C

To: Ruth Martin [REDACTED]

Hello Ruth,

Thank you for your email. All information about all items on consent are available on the website. Councilmembers take it upon themselves to research each item on the Agenda thoroughly, as is our responsibility to our constituents. The information we receive is also readily available to the public. If there is an item on the consent that you are unsure of or would like clarification on you can reach out to any Councilmember or Staff. You are still welcome to make public comments on the consent calendar and request items be pulled for further review or comment. As I see it, the purpose is to avoid a situation like last night where one member of the public pulled 3 items from consent to talk about the same theme of government waste.

Kind Regards,

Mark Enmeier

Councilmember Enmeier was clear.

[T] the purpose is to avoid a situation like last night where one member of the public pulled 3 items from consent to talk about the same theme of government waste.

Please note that Mr. Enmeier correctly stated that “3 items” were pulled. Likewise, during the Council discussion of Agenda Item 10C, both Mr. Cabral and Mr. Duncan stated that each listing under the Consent Calendar is an item. These statements are confirmation by them that each item is a separate item, which is consistent the word item, as used in the Government Code / Brown Act, even when multiple items are included and grouped together for Council discussion on the Consent Calendar.

The City Attorney did not outwardly address that Resolution 24-13, as drafted, or approved is legal or if it violates the Government Code. Why? Given the public’s comments and concerns, it is odd that no legal analysis was provided to the public or Council (as there is no indication this went to Closed Session, and if the City Attorney did so in the Monday-Tuesday meetings with the Councilmembers, that is a Brown Act violation (potential), and as I have admonished Scott Smith, Ms. Mitchell, former City Managers, and Mr. Hall, these meetings are clear “Hob and Spoke” violations of the Brown Act. Ms. Mithcell’s attempt to justify these meetings between her and Council members individually the day before of the day of Council meetings, are problematic given that group meetings of more than 2 members are always avoided. No minutes are kept. No notes are retained. Why are these meetings even needed, as the City Manager and City Attorney can provide written public explanations rather than meeting behind closed doors to side-step the Brown Act? Yet, this is not the issue for this Correct and Cure letter. But is is necessary to clarify how we got here.

For purposes of this letter, moving forward, it is agreed that if changes to Policy and Procedure were, at least according to the City, adopted on or about January 16, 2024, via Resolution 24-13, those changes are contained in Attachment 1.

The Attachment 1 changes would effectively combine each Item in the Consent Calendar together as a single item, resulting in a restriction on public speakers each to a single comment opportunity (3 minutes) for all combined items, even though the Government Code specifies that each member of the public is entitled to speak (3 minutes) for each item on the Council’s Agenda.

The restrictions, newly adopted in Resolution 24-13 described above is/are violations of a central provision of the Ralph M. Brown Act; the ability of the public to address its governmental entity separately on each item before that body.

In its meeting of January 16, 2024, the City Council, by a 3 – 2 vote, approved item 10C; Resolution 24-13. In so doing, the City Council took an action as defined in Government Code § 54952.6 because Council members approved by a vote of 3 – 2 Resolution 24-13 amending Policy and Procedure 1201-11.

The amended and modified Council Policy and Procedure 1201-11 limited members of the public from speaking individually to each item on the Agenda by restricting comments on all Consent Calendar items to one 3-minute communication. No legal basis for overriding the Government Code’s permission to address each item on the Agenda is included anywhere before, during, or after the vote.

Yet, the Government Code requires a city and/or city council to allow separate

communications by every member of the public for each item, and the Government Code does not have an exception for items included on a Consent Calendar. The Councilmembers' approved.

In particular, Government Code Section 54954.3(a), states, in part:

(a) Every agenda for regular meetings shall provide an opportunity for members of the public **to directly address the legislative body on any item of interest to the public**, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body ... (emphasis added.)

The City is required to allow each member of the public to address the council **“on any item of interest to the public.”** It appears the problem is the City's interpretation of the word any.

Dictionary.com defines any:

one, a, an, or some; one or more without specification or identification: If you have any witnesses, produce them. ...

A review of Merriam-webster.com leads to similar definitions of “any.” It is difficult to determine any basis under which the City can argue the items in the Consent Calendar are a “single item,” as combined therein, in light of the word “any” contained in the applicable Government Code(s) relevant here. Any item is not “all items in the Consent Calendar.” Resolution 24-13 adoption of this new restriction on public comment flies in the fact of longstanding City procedures, but more importantly here, the Government Code requirement to allow public discussion of “any” item on the Agenda.

This requirement to allow public comment is being denied because under new Policy and Procedure 1201-11, each member of the public can comment only once on multiple items combined under the heading Consent Calendar included in the San Clemente Council Agenda.

The format of the Council Agenda makes clear that every item included under the Consent Calendar is listed and designated separately by letter. It would take more than Harry Houdini to magically convert many to one. Here, Houdini is not present to solve the City's mistake(s).

The reason for making this change is not essential to overturn the City's decision. But it is clear that newly appointed Mayor Cabral and members Duncan and Enmeier have no desire to hear the public's comments and/or their desire to limit those comments. Yet, in running for election, they knew in advance that Council meetings can last, twice a month, well into the night. More relevant, shortening meetings is easily accomplished if these members simply stop cross-talking in violation of Rosenberg's Rules of Order, and stop having staff and others who are not subject to time limits from incessant and long-winded presentations. Similar time savings can legally be implemented for public awards, staff and outside agency reports, and incessant questions by members of obvious points where they ask staff for an explanation of the obvious. Point being, those wasteful encounters/statements can be rolled-back. Instead, the City illegally rolled back limited 3-minutes presentations by the public.

Limiting each member of the public to a single 3-minute address for all items included on the Consent Calendar violates the terms of Government Code Section 54954.3(a). There are other cures for long meetings. For example, a city council can limit unduly repetitive comments or irrelevancies. Groups can be limited. Council is permitted, in some circumstances, to limit comments. But none of the above legal restrictions were adopted by

Resolution 24-13.

RECAPPING:

Pursuant to Government Code Section 54960.1, this letter is a demand that the City Council Cure and Correct the illegal actions taken by the City Council and request the following:

Eliminate the changes made by the vote on Agenda Item 10C, on January 16, 2024, to Policy and Procedure 1201-11.

In the alternative, and to the same effect, Council can approve modification to Policy and Procedure 1201-11 to allow members of the public to address the Council on each item on the Agenda including, but not limited to, each item included on the Consent Calendar individually whether the item is pulled by a Council member(s).

As provided by Government Code § 54960.1, the City has 30-days from the receipt of this demand to either cure or correct the challenged action, or inform me of your decision not to do so.

If the City fails to cure or correct, as demanded, such inaction may leave no recourse but to seek a judicial invalidation of the challenged action(s) pursuant to Section 54960.1 and or other provisions of the law, in which case the City will be asked to pay court costs and reasonable attorney fees pursuant to Section 54960.5 and other provisions of the law.

Attorneys' fees and costs are owing if the City decides to comply with the request(s) herfein to cure and correct at any future Council meeting. The City does not get a free pass.

REQUEST FOR CONFIRMATION OF RECEIPT:

Because the Government Code has strict guidelines for compliance, I ask that each of the recipients respond to this email and include a statement of receipt and the date he/she received the email.

I also ask for a specific City response within the statutory 30-day period.

Respectfully yours,

Brad Malamud

Sent by email to each of the persons listed above.

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Brad Malamud

Sent from my gmail account: