



**LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION**

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May 20, 2009

Mr. Howard Vipperman
La Habra Heights City Council
1245 North Hacienda Road
La Habra Heights, California 90631

Subject: Alleged Brown Act Violations
PID Case 09-0319

Dear Mr. Vipperman,

This office opened an inquiry in response to a complaint we received alleging that you sought to violate the Brown Act by asking that a matter be "put back on the agenda. I would like to not take public comments, if possible. I would like a agenda item crafted to amend our previous decision by removing any conditions. Specifically deny the appeal." The subject line of the email reads "RE: 1454 Kashlan – Variance?" Without reaching any final conclusions, we believe that our ultimate goal of compliance with the letter and the spirit of the Brown Act as a means of ensuring the integrity of the decision making process is best served by addressing directly the issues this email illustrates.

First, your council, as a legislative body, may employ whatever means it deems appropriate to submit matters for inclusion on an agenda, so long as that process does not involve a secret vote, collective concurrence or serial meeting. We do not suggest that such circumstance exists under the facts of this email. We make that point only to demonstrate that it is well within the province of a member of a legislative body to submit matters for consideration and placement on the body's agenda.

However, the Brown Act establishes the right of public comment on any matter before a legislative body, before or during consideration of that item, with only a few exceptions. Government Code Section 54954.3 states

(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, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not

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provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.

Whether set on an agenda for a regular or a special meeting, the opportunity for public comment would be mandated before or during consideration of the matter. Whether set for open session consideration, or if the matter falls within one of the express exceptions for closed session consideration, public comment would be mandated before or during consideration of the matter. The only exception that might apply requires that the matter had previously been discussed "at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body." *Id.* In this case, while it appears that the matter has previously considered by the Council, it is nearly impossible to conceive of a circumstance in which the removal of conditions that were part of a previous decision would not constitute a substantial change since the prior hearing of the matter.

More troubling is the concept of "crafting" an agenda item for the purpose of obviating the opportunity for public comment. While this matter has not, to our knowledge, been agendized, and though we do not find a violation of the Brown Act has, at this point, occurred, the nature of the request memorialized in the subject email strongly suggests a desire to subvert the open decision making process and shut down the public discourse on a matter. It is crucial to fully understand that the integrity of the decision making process for legislative bodies like the La Habra City Council sacrifices efficiency of "its business" for inclusion of its constituents. The rules set forth in the Brown Act have stood the challenge of more than fifty years, and have proven to serve the public's interest consistently. Government Code Section 54950 describes the mission of the Brown Act most completely:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do

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not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

It is possible that the request was written with the intent of simplifying a record regarding a variance that had already been considered. However laudable simplification may be, crafting an agenda item to avoid public comment does not serve the interests of the public. The public has a right to participate in discussions which are an integral part of the deliberative process that the Brown Act requires is conducted openly. Public confidence in the integrity of the decision making process cannot be expected if a matter that was originally considered and decided publicly is later altered or amended at the request of one of the members of a legislative body, without benefit of public consideration and comment.

We are confident that you will agree with our observations regarding the goal of public agencies to serve the interests of the people we serve, and we expect you will be mindful of the rights of the public to participate in the decision making process. Given our goal of compliance, and the nature of the information discussed herein, we will take no further action on this complaint at this time. We will continue to monitor the agendas and meetings of your agency, and we fully expect that you and your fellow council members will endeavor to comply with both the letter and the spirit of the Brown Act on behalf of the citizens of La Habra Heights.

Very truly yours,

STEVE COOLEY
District Attorney
By

JENNIFER LENTZ SNYDER
Assistant Head Deputy