



City of Hermosa Beach

City Hall
1315 Valley Drive
Hermosa Beach, CA 90254

Staff Report

Staff Report

REPORT 19-0796

**Honorable Mayor and Members of the Hermosa Beach City Council
Special Meeting of December 4, 2019**

**BROWN ACT DEMAND FILED BY TONY HIGGINS
PERTAINING TO SELECTION OF MAYOR PRO TEMPORE
(City Attorney Mike Jenkins)**

Recommended Action:

Staff recommends that the City Council consider whether to revisit the November 21, 2019 vote selecting the Mayor Pro Tem.

Background:

The City is subject to the Brown Act, which provides that meetings of the City Council must be open and public. All items of business taken up by the City Council generally must be included on a posted agenda. To assure compliance, the Brown Act allows interested persons to challenge the City's compliance by making a "demand" relating to an action alleged not to be taken in compliance with the Act.

Anthony Higgins delivered such a "Brown Act Cure & Correct" Demand Letter to the City on November 27, 2019, alleging violations of the Brown Act in connection with the Council's selection of a Mayor Pro Tem at its November 21, 2019 meeting.

The Brown Act provides that any person may challenge an action taken by the City Council by filing a written demand to cure or correct the action alleged to have been taken in violation of the Brown Act. This written demand must be filed within a certain time period. Mr. Higgins' letter satisfies these requirements.

The Brown Act dictates that the City Council determine within 30 days of receipt of demand whether it will cure or correct the challenged action. Note that the Brown Act is designed to discourage litigation by providing that the City may take action to address the concern raised, regardless whether an actual violation occurred and without admitting any violation. Essentially, the Act provides an opportunity for a "do-over" to avert litigation; the Council may reconsider an action and effectuate a "cure" without conceding that a violation of the Act occurred. If the City Council does not act within 30 days, it is deemed to have determined not to take any corrective action. Hence, the Council has 30

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days within which to determine whether to take corrective action. (Government Code Section 54960.1(b)).

A copy of the demand letter is attached (**Attachment 1**). It asserts two violations of the Brown Act:

- 1) That the Council bypassed the normal rotation without discussion or advance notice.
- 2) That the selection of the Mayor Pro Tem “occurred as a culmination of a discussion in closed session of a matter which the Act does not permit to be discussed in closed session.”

Discussion:

My analysis of the allegations contained in the demand letter is as follows:

Allegation #1:

California Government Code section 54954.2 sets forth the agenda requirements for items of business on the agenda of a legislative body:

“(a) (1) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.”

The posted agenda for the November 21, 2019 City Council meeting included the following description:

APPOINTMENT OF MAYOR AND MAYOR PRO TEMPORE; COUNCIL COMMITTEE REORGANIZATION; AND RESOLUTION DECLARING THE NOVEMBER 5, 2019 GENERAL MUNICIPAL ELECTION FOR THE CITY OF HERMOSA BEACH OFFICIALLY CONCLUDED AS DECLARED BY THE LOS ANGELES BOARD OF SUPERVISORS ON NOVEMBER 19, 2019

(City Clerk)

Recommendation: City Clerk recommends that the City Council make the following appointments, consistent with the current rotation policy for Mayor and Mayor pro tempore and adopt the resolution (to be made available prior to the meeting) declaring the November 5, 2019 General Municipal Election for the City of Hermosa Beach officially concluded as declared by the Los Angeles Board of Supervisors on November 19, 2019.

1. Mayor for a term ending Thursday, November 12, 2020; and
2. Mayor pro tempore for a term ending Thursday, November 12, 2020.

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The agenda description for the item satisfies the requirements of Section 54954.2. The Brown Act does not include any requirement for notice beyond that contained in section 54954.2.

Government Code section 36801 provides that the city council of a general law city shall select one of its members as mayor and another of its members as mayor pro tempore. Any member of the Council is eligible for selection to either position. While the City may informally follow a rotation procedure, no member is entitled to be selected and neither the Council nor staff has advance knowledge of who will be nominated or elected. Hence, as a practical matter, it would not be possible without violating the Act to provide advance notice of a deviation from the rotation practice.

I conclude that the posted agenda's description "APPOINTMENT OF MAYOR AND MAYOR PRO TEMPORE" provided legally adequate notice of the agenda item and that the demand from Mr. Higgins does not state a violation of the Brown Act.

Allegation #2:

The agendas for closed sessions of the City Council are posted as required by the Brown Act. Matters addressed in closed session are limited to those on the posted agenda or occasionally added to the posted agenda pursuant to Government Code section 54954.2(b)(2). As Mr. Higgins correctly observes, the subject of selection of Mayor Pro Tem is not a proper subject for closed session and was never discussed by the Council in closed session.

Hence, I conclude that the second allegation raised in the demand letter does not state a violation of the Brown Act.

Conclusion:

Based on the foregoing, I conclude that the demand from Mr. Higgins is without merit, that no violation of the Brown Act occurred at the November 21, 2019 City Council meeting, and that no cure is required.

Nevertheless, Council may choose to reconsider the November 21 action. Such action in response to the demand for a cure of alleged Brown Act violations may alleviate the concerns raised in Mr. Higgins' letter and will avert the need to litigate these issues. Should Council choose to rescind the November 21 vote and take a new vote on the selection of Mayor pro Tem, that action would constitute a "cure and correct" within the meaning of Government Code section 54960.1. Further, such an action would not be deemed a concession that a violation occurred as per subparagraph (f) of Section 54960.1:

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(f) The fact that a legislative body takes a subsequent action to cure or correct an action taken pursuant to this section shall not be construed or admissible as evidence of a violation of this chapter.

Further, subsection (e) of Section 54960.1 provides:

(e) During any action seeking a judicial determination pursuant to subdivision (a) if the court determines, pursuant to a showing by the legislative body that an action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 has been cured or corrected by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice.

Attachments:

1. Anthony Higgins "Brown Act Cure & Correct" Demand Letter dated November 27, 2019

Respectfully Submitted by: Mike Jenkins, City Attorney

Noted: Suja Lowenthal, City Manager

From: tony higgins <tony.higgins123@gmail.com>
Sent: Wednesday, November 27, 2019 9:43 AM
To: City Council <citycouncil@hermosabeach.gov>
Cc: Michael Jenkins <Michael.Jenkins@bbklaw.com>; Suja Lowenthal <suja@hermosabeach.gov>; Ann Yang <anny@hermosabeach.gov>; Gary Mammet <gary@mammet.net>; Walter Booty <walterbooty@outlook.com>
Subject: Brown Act Cure & Correct Demand Letter

*Mayor Campbell
Members
Hermosa Beach City Council*

Brown Act Cure & Correct Demand Letter

Dear Mayor Campbell ,

*This letter is to call your attention to what I believe was a substantial violation of a central provision of the Ralph M. Brown Act, one which may jeopardize the finality of the action taken by **the Hermosa Beach City Council***

*The nature of the violation is as follows: In its meeting of November 21, 2019, the Hermosa Beach City Council took action to bypass the normal Mayor Pro-Tem rotation recommended by the City Clerk without discussing the justification for bypassing the normal rotation in advance in open session and without giving the public a chance to provide informed input. **While I fully support Mayor Campbell and truly believe she will make a good Mayor I cannot accept that the public could not have been notified in advance of the plan to bypass the normal Mayor Pro-Tem rotation recommended by the city clerk in the below referenced agenda, I cannot accept that a public discussion was not held on the actions that justified this bypass, however painful that discussion might be, and I cannot accept the public was not given an opportunity to make informed comments on this matter.***

This violates the very spirit of the Brown Act if not the letter of the law and raises the appearance of a back door deal.

http://hermosabeach.legistar1.com/hermosabeach/meetings/2019/11/12/55_A_City_Council_19-11-21_Adjourned_Meeting_Agenda.pdf

The action taken was not in compliance with the Brown Act because it occurred as the culmination of a discussion in closed session of a matter which the Act does not permit to be discussed in closed session, 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 **Hermosa Beach City Council** that urgent action was necessary on a matter unforeseen at the time the agenda was posted.

Pursuant to that provision (Government Code Section 54960.1), I demand that the Hermosa Beach City Council cure and correct the illegally taken action as follows: vacate the appointment of Councilman Massey as Mayor pro-tem and provide the public the opportunity to comment on which it was deprived, e.g. the formal and explicit withdrawal from any commitment made, coupled with a disclosure at a subsequent meeting of why individual members of the legislative body took the positions — by vote or otherwise — that they did, accompanied by the full opportunity for informed comment by members of the public at the same meeting, notice of which is properly included on the posted agenda. Informed comment might in certain circumstances include the provision of any and all documents in the possession of the local agency related to the action taken, with copies available to the public on request at the offices of the agency and also at the meeting at which reconsideration of the matter is to occur.)

As provided by Section 54960.1, you have 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 you fail to cure or correct as demanded, such inaction may leave me no recourse but to seek a judicial invalidation of the challenged action pursuant to Section 54960.1, in which case I would also ask the court to order you to pay my seek court costs and reasonable attorney fees in this matter, pursuant to Section 54960.5.

Respectfully yours,

Anthony Higgins

End

Dear Ms Yang

Please include this as a written communication to the next city council meeting

Thank you