



Staff Report

File #: REPORT 19-0197, Version: 1

Honorable Mayor and Members of the Hermosa Beach City Council Regular Meeting of March 26, 2019

BROWN ACT COMPLAINT FILED BY ANTHONY HIGGINS (City Attorney Mike Jenkins)

Recommended Action:

Staff recommends that the City Council:

1. Receive and file this report; and
2. Direct the City Attorney to send a letter (Attachment 2) pursuant to Government Code §54960.1 (c)(2) communicating the City Council's determination that no Brown Act violation occurred and therefore that the City Council will not cure or correct the challenged actions.

Background:

Anthony Higgins delivered a "Brown Act Cure and Correct Demand Letter" ("Complaint") to the City on February 25, 2019 alleging violations of the Brown Act. 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. The demand must clearly describe the challenged action of the City Council and the nature of the alleged violation. This report will address the substantive allegations contained in the Complaint.

The City takes every Brown Act allegation seriously, even when it would appear on its face to be without merit. 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. If the City Council does not act within 30 days, it is deemed to have determined not to take any corrective action. Tonight's meeting is within the 30-day period for response. Pursuant to Government Code § 54960.1(b), the Council must determine whether a violation occurred and if so, whether to cure the violation.

A copy of the Complaint is attached as "**Attachment 1.**" It alleges three violations of the Brown Act:

1. The Council denied Mr. Higgins the right to publicly comment on the City Manager's Report regarding the Hermosa Avenue and Strand Improvement Project.
2. The Council has imposed administrative procedures that have the effect of limiting the right of the public to speak on only one agenda item.
3. The Council has denied the public's right to ask questions to the Council on agenda items, and the City Clerk should inform the public of its right to ask questions to Councilmembers.

Analysis:

Complaint #1:

In “Item 1” of Mr. Higgins’ letter, he claims that he was not given the opportunity to speak before or during the presentation of the City Manager’s Report. He further claims that an email he sent to the Council was not addressed. He demands that “members of the public be consistently given an opportunity to speak to any and all city council agenda items for at least 2 minutes per agenda item.”

The Council’s policy and practice is to allow public comment on each agenda item as it comes up, with the exception of comments on “Miscellaneous Items and Meeting Attendance Reports - City Council” and “Other Matters - City Council,” as to which public comments must be made under Oral Communications. This policy is stated expressly on the agenda. Hence, the City’s policy and practice is entirely consistent with Government Code section 54954.3, which requires in relevant part that “[e]very 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.” Hence, there is nothing to cure or correct.

The speaker card Mr. Higgins completed and submitted to the City Clerk at the outset of the February 25, 2019 meeting stated in his handwriting that he wished to speak during the “Public Participation Topic” regarding the “Hermosa Avenue Project Truck Route.” The speaker card specifically does not state that Mr. Higgins wished to speak during the City Manager’s Report. Consequently, it was entirely reasonable for the City Clerk and the Mayor to interpret Mr. Higgins’ speaker card to mean that he wished to speak during Oral Communications; and in fact, he was called upon to speak (for not more than three minutes) during Oral Communications and did so on the subject of the Hermosa Avenue Project Truck Route. Had Mr. Higgins’ speaker card clearly stated that he wished to speak during the City Manager’s Report agenda item, he would have been called when that item was taken up.

There are three other observations to be made. First, the City Manager’s Report is a unilateral and purely informational report that engenders no action by the Council. Second, had Mr. Higgins spoken up in some manner at the conclusion of the City Manager’s Report to indicate that he wished to speak during that agenda item, he would have been allowed to do so. And third, when Mr. Higgins did speak during Oral Communications immediately following the City Manager’s report, he did not raise any concerns about not being given an opportunity to speak during the City Manager’s Report.

In Mr. Higgins’ letter, he also alleges Brown Act violations because the Council did not immediately act upon his demands and instruct staff to “follow-up” on his questions. As Mr. Higgins observes in his Complaint, there is nothing in the Brown Act that requires the Council to act upon a resident’s

demands or to answer questions. Hence, the Council did not violate the Act for failure to take action on Mr. Higgins' issues.

In summary, Mr. Higgins' letter's first Item does not disclose a violation of the Act. Hence, there is nothing to cure or correct.

Complaint #2:

"Item 2" of Mr. Higgins' letter suggests that the Council has "imposed administrative procedures" that limit public comment to one agenda item per meeting. He demands that "the city correct any administrative procedures that would have tend to have the effect of limiting a citizen's opportunity to speak on more than one agenda item per open session of the City Council unless there is a legal basis and a compelling reason to do so."

This assertion is patently untrue as evidenced by the Council's actual practice (witness the Granicus recording of any Council meeting to see members of the public speaking on multiple agenda items) and the procedure set forth on the face of the Council agenda, which provides the following times during which members of the public may speak:

1. During the time allotted to address the City Council on any items within the Council's jurisdiction not on this agenda, on items on this agenda as to which public comment will not be taken, or to request a removal of an item from the consent calendar;
2. During discussions of items removed from the consent calendar;
3. During Public Hearings; and,
4. During discussion of items appearing under Municipal Matters.

In short, there is no procedure that limits public comment to just one agenda item per meeting. Consequently, there is no need for the Council to cure or correct any practice.

Complaint #3:

"Item 3" of Mr. Higgins' letter does not claim the Council violated the Brown Act. Rather, he demands "the city clerk, when announcing the restrictions on questions to council members for NON-agenda items; the city clerk must balance this by informing the public clearly and unambiguously that the Brown Act does not prohibit questions to council members when an agenda-item is being considered."

The Brown Act does not require the City Clerk to make any announcements regarding the content of public speech. And, except to the extent that public speech be relevant to the subject matter of the agenda item and within the jurisdiction of the Council, neither does the Brown Act address whether public speakers make affirmative statements or ask questions. And, finally, the Act does not require

Councilmembers to answer questions raised by public comments. In short, it is not the City Clerk's role to inform the public how to make presentations to the Council.

Consequently, there is no need to cure or correct any practice identified in Mr. Higgins' Item 3.

Conclusion:

Based on the foregoing, the Complaint is without merit, no violation of the Brown Act occurred at the February 12, 2019 City Council meeting, and no cure is required. Accordingly, the recommendation is for City Council to receive and file this report and direct the City Attorney to send the attached letter (Attachment 2) to Mr. Higgins.

Attachments:

1. Mr. Higgins' February 25, 2019 Brown Act Cure and Correct Letter
2. Proposed response to Mr. Higgins' letter

Respectfully Submitted by: Mike Jenkins, City Attorney

Concur: Suja Lowenthal, City Manager