File #: REPORT 20-0024, **Version:** 1

Honorable Mayor and Members of the Hermosa Beach City Council
Regular Meeting of January 14, 2020

BROWN ACT DEMANDS FILED BY KEN HARTLEY AND JUSTIN LEDDEN PERTAINING TO SELECTION OF MAYOR AND MAYOR PRO TEMPORE

(City Attorney Michael Jenkins)

Recommended Action:

Staff recommends that the City Council consider allegations in the two attached letters and take action as Council deems appropriate.

Background:

To promote transparency and comply with the Brown Act, City Council meetings are open and public. All items of business taken up by the City Council generally must be included on a posted agenda, which provides the public advance notice and promotes public participation. To promote the statute's overarching value of accountable government, the Brown Act allows interested persons to challenge the City's compliance by making directly to the City a "demand" to cure or correct an action alleged not to have been taken in compliance with the Brown Act. A written demand must be filed within a certain time period.

This procedure creates an opportunity for the City to account for its actions and reinforce the community's confidence that the Council is governing in an open and transparent manner. Within 30 days of receiving a timely demand, the Brown Act requires that the City Council determine 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 days within which to determine whether to take corrective action. (Government Code Section 54960.1(b)).

On December 4, 2019, the City Council considered such a Brown Act cure and correct demand letter from Tony Higgins, alleging violations of the Brown Act in connection with the Council's selection of a

Mayor Pro Tem at its November 21, 2019 meeting. At that meeting, after considering public comment, the Council chose to rescind its action of November 21, 2019 electing Justin Massey Mayor Pro Tem. Thereafter, nominations for Mayor Pro Tem were solicited and Justin Massey and Hany Fangary were nominated for Mayor Pro Tem. Justin Massey was elected Mayor Pro Tem by a vote of 3-2. As stated in the staff report presented at the December 4, 2019 meeting, the Council's rescission of the November 21 vote and its new vote on the selection of Mayor Pro Tem constituted a "cure and correct" within the meaning of Government Code section 54960.1.

Subsequently, in a letter received December 18, 2019, Kenneth A. Hartley alleges violations of the Brown Act in both the November 21, 2019, Council meeting and the subsequent December 4, 2019, Council meeting, arising from the Council's selection of a Mayor and Mayor Pro Tem. Similarly, in a letter dated December 19, 2019, Justin Ledden, representing Dina Fangary,[1] alleges violations arising from, among other things, the actions that appointed someone other than Hany Fangary as Mayor Pro Tem.[2] It is these latter two demand letters that require the City Council's attention tonight.

Discussion:

To assist the Council in evaluating the claims and determining a course of action, this report first analyzes the allegations and legal contentions set forth in each letter and then suggests potential actions the Council may take.

The demand letters from Mr. Hartley and Mr. Ledden are attached (**Attachments 1 and 2**). Both letters rely in large part on these three fundamental misconceptions:

1) Misconception: *That the City Council's November 21, 2019 action selecting Justin Massey as Mayor Pro Tem was improper because it did not follow an informal rotation policy.*

Fact: 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. The Council is not bound by tradition.

[1] Councilmember Fangary is married to the Petitioner and serves as co-counsel in the lawsuit referenced in Mr. Ledden's letter, *Fangary v. City of Hermosa Beach, et al,* LACSC Case No. 19STCP05134. Consequently, Councilmember Fangary has a conflict of interest that precludes him from participating in this agenda item.

[2] Fangary's lawsuit against the City claims that the City Council had to select Hany Fangary as Mayor Pro Tem.

2) Misconception: *That the Brown Act requires that the public be given notice of the Council's intention to deviate from the informal rotation policy.*

Fact: 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)
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> ***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.
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> 1. Mayor for a term ending Thursday, November 12, 2020; and
> 2. Mayor pro tempore for a term ending Thursday, November 12, 2020.

The agenda description for the item provides a brief general description of the fact that the City Council, among other things, will select a Mayor and Mayor Pro Tem. This description provides sufficient notice to the public that the Council will be considering those appointments and thus satisfies the requirements of Section 54954.2. The Brown Act does not include any requirement for notice beyond that contained in section 54954.2.

The purpose of the requirement that the agenda contain "a brief general description of each item of business to be transacted or discussed at the meeting," is to inform the public of the business to be taken up by the Council at the meeting. This gives members of the public interested in the business items notice of the Council's intention to consider them and an opportunity to attend. The agenda is not intended to, nor could it, predict the outcome of the votes to be taken during the meeting. Matters of business are routinely identified in the agenda where the Council has the discretion to take any number of alternative actions at the meeting. The decision as to who to select for the Mayor Pro Tem decision was no different; the Council had absolute discretion to select any one of its members as Mayor Pro Tem, regardless of whatever expectations members of the body or of the public may have

had going in to the meeting. It would not be possible without violating the Act to determine in advance that the Council would deviate from the informal rotation practice.

The “demand” letters assert that members of the public would have offered comment had they known of the Council’s action before the fact. Whether or not true, this is not an argument related to compliance with the Brown Act. This is the same lament as “had I known the Council would approve the development project, I would have attended the meeting and argued against it.” Unpredictable things happen at city council meetings; the Brown Act provides no remedy for disappointment over outcomes. What the Brown Act requires is public notice of the general item to be discussed and an opportunity for public comment. Both of those criteria were satisfied at the November 21, 2019, meeting. Moreover, in response both to Tony Higgin’s letter and some public social media commentary, the Council chose to notice an item on a public agenda to revisit the selection of the Mayor Pro Tem on December 4. At that meeting the Council heard public comment and considered the item anew.

3) Misconception: *That the November 21, 2019 actions to select the Mayor and Mayor Pro Tem were improper because they were not preceded by public comment.*

Fact: No member of the public requested an opportunity to comment on the item at the November 21 meeting. Indeed, no member of the public was denied an opportunity to address the Council and no one alleges otherwise. Section 54954.3 of the Brown Act provides that the public must be afforded an opportunity to address the Council on each item of business. As a matter of longstanding practice, and consistent with Section 54954.3, the City Council takes public comment on each item of business listed on the agenda. The agenda, including the agenda for the November 21 adjourned regular meeting, includes this instruction:

> **“Public Participation Speaker Cards:**
> If you wish to speak during Public Participation, please fill out a speaker card at the meeting. The purpose of the speaker card is to streamline and better organize our public comment process to ensure names of speakers are correctly recorded in the minutes and where appropriate, to provide contact information for staff follow-up.”

Council meetings are relatively informal, and it is commonplace for people in the audience to stand and ask to be heard. The mayor routinely accepts public comment from people who do not fill out a speaker card.

The selection of Mayor and Mayor Pro Tem was listed on the November 21 agenda under the heading “Presentations.” No speaker cards were submitted for public participation for that item. No member of the public rose and asked to speak prior to or during consideration of the item.

Following submittal of nominations for Mayor Pro Tem, the newly elected Mayor Campbell asked for

comment. Neither Councilmember Fangary nor anyone else in the chambers requested the opportunity to comment.

In short, the absence of public comment may have been attributable to the expectations people had going in to the meeting, but it was not because anyone was denied the opportunity to speak.

The remaining assertions specific to each letter are now addressed in turn below. The allegation is summarized in italics followed by the response.

The Hartley letter:

1. *The nomination of Mayor Campbell did not receive a second*. This is a question of parliamentary procedure, which is not governed by the Brown Act. In any event, under the applicable rules of parliamentary procedure, nominations do not require a second.

2. *There was no opportunity for public comment.* This assertion is addressed in full above. There was an opportunity; there simply was no one seeking to address the Council on this item. This agenda item was handled in the same manner as every agenda item on every Council meeting agenda. No member of the public indicated a desire to speak, either by submitting a speaker card or otherwise.

3. *Council committed a serial meeting violation.* The Hartley letter speculates that more than two Councilmembers discussed this matter privately before the meeting. There is no evidence of this having occurred. The concern, however, was rendered moot because the Council subsequently noticed a public discussion of the selection of the Mayor Pro Tem, heard public comment, and took action. In this way, the Council engaged in public deliberations, including lengthy individual explanations of their positions. Also, the vote tally changed the second time the item was addressed. Together, this demonstrates the December 4 meeting was a sincere effort to allay any concerns about the transparency of the decision-making process, effectively curing any possible alleged violation.

4. *The Brown Act creates specific agenda obligations for notifying the public with a "brief description" of each item to be discussed or acted upon.* As discussed above, the agenda for the November 21, 2019 meeting fully satisfied these agenda requirements.

Finally, as noted above, on December 4, 2019, the Council took action to cure and correct the November 21 action as regards selection of the Mayor Pro Tem. To the extent Mr. Hartley's letter is directed at that action, its allegations are moot.

The Ledden letter:

Mr. Ledden is co-counsel with Councilmember Fangary in a lawsuit filed against the City by Councilmember Fangary's wife, Dina Fangary, which seeks to invalidate the Council's November 21, 2019 decision to select Justin Massey as Mayor Pro Tem. The lawsuit was filed on the morning of December 4, prior to the Council's meeting of December 4 and its decision to cure and correct its November 21 decision. Most of the issues raised by Mr. Ledden in his December 19, 2019 letter were raised earlier in correspondence dated December 3 and 4, 2019 from Councilmember Fangary and in the lawsuit itself. In light of the Council's December 4 action, described with more particularity above, these allegations are moot.

The remaining assertions are as follows:

1. *"It appears that the City Council agreed with the concerns raised by Mr. Higgins and Ms. Fangary regarding Brown Act violations as it took steps to rescind Mr. Massey's November 21, 2019 nomination at its December 4, 2019 meeting."* As noted in the December 4, 2019 staff report, the City Council may take action to address the concerns raised, regardless whether an actual violation occurred and without admitting any violation. Indeed, the staff report stated as follows:

> 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:
>
> (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 as follows:

> (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.

Accordingly, Mr. Ledden's observation is inaccurate.

2. *"The City Council must then also concur that the nomination and appointment of Mary Campbell as Mayor of the City during the November 21, 2019 City Council meeting was similarly in*

violation of the Act, for the same reasons, and for other reasons pointed out below." As explained immediately above, the action on December 4 was not an admission of a violation of the Act. Instead, it was a good faith effort to provide those concerned with the Council's decision an opportunity to express those concerns to the Council and an opportunity for the Councilmembers to explain their various reasons for the position they were taking. No such genuine issues have been raised with respect to the selection of the mayor.

3. "*The November 21, 2019 meeting was scheduled to be a Ceremonial meeting, not a regularly scheduled public meeting."* In accordance with Sections 54954 and 54955 of the Brown Act, the November 21 meeting was an "adjourned regular meeting" of the City Council, a specific type of meeting contemplated by the Brown Act. The business conducted at the November 21st meeting included adopting the resolution declaring the election results. From the agenda description, Councilmember Fangary and the public were aware that the agenda included items of business that could only be done by the Council (and therefore only at a properly noticed open and public Council meeting). There is no such thing as a "Ceremonial meeting" in the laws that govern general law cities. Mr. Ledden's description of the meeting is inaccurate.

4. "*As it was understood prior to that meeting, nominations and appointments would take place pursuant to the City's current rotation schedule for Mayor and Mayor pro tempore appointments."* Notwithstanding Mr. Ledden's expectations, or those of his co-counsel Councilmember Fangary or his client Dina Fangary, as discussed more fully above in this report, people's expectations do not govern the Council's actions. The outcome of some items is unexpected; unanticipated result does not constitute a Brown Act violation. Moreover, the Brown Act does not govern which councilmember is selected to serve as Mayor Pro Tem.

5. *"As such, no public participation was expected or required. However, based on the conduct of the Council, it is clear that the current rotation schedule was not followed and appropriate notice and public participation was required for the appointment of, not only the Mayor pro tempore, but the Mayor as well. No such notice or public participation occurred in connection with Campbell's November 21, 2019 appointment as Mayor of the City."* As noted earlier in this report, the agenda for the November 21, 2019 meeting satisfied the notice requirements of the Brown Act in all respects. As further discussed above, opportunity for public comment was provided as it is for all scheduled agenda items. No public participation was denied.

6. "*Specifically, the conduct of Mary Campbell, Stacey Armato, and Justin Massey at and after the November 21, 2019 meeting provide evidence, or at least give the perception, that these council members met prior to the November 21, 2019 meeting to discuss the plan to circumvent the current rotation schedule and nominate and vote for Massey over Fangary."* This assertion is speculation, nothing more. Mr. Ledden offers no facts and nothing more than inferences to support his allegation. Mr. Ledden's letter was written well after the Council's December 4 meeting, yet fails to address the lengthy and detailed explanations offered by Councilmembers Armato, Campbell and Massey at that

meeting, as to why each of them had independently come to the view that Councilmember Fangary was not a suitable candidate for Mayor Pro Tem at this time. Each councilmember detailed their respective observations of how Councilmember Fangary had over the course of many months engaged in behavior that rendered him unsuited for the Mayor Pro Tem position at this time. The record of that meeting demonstrates that each member had his or her own experiences to rely on in coming to this conclusion, and that the November 21 vote was merely the culmination of many months of observation and frustration.

7. "*The above statement [social media quote from former Councilmember Duclos] evidences, or at least strongly implies, that City Council made that choice while Councilmember Duclos was serving on the Council prior to November 18, 2019."* Former Councilmember Duclos' comments appear to reflect a similar experience as his colleagues; but he did not participate in the selection of the current Mayor or Mayor Pro Tem having not run for re-election.

Conclusion:

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

As noted above, on December 4, 2019, the City Council rescinded its November 21 action as regards selection of the Mayor Pro Tem, and did the process over again. This constituted a "cure and correct" within the meaning of Government Code section 54960.1. The allegations that the selection of the Mayor was done in violation of the Brown Act have not been addressed by the Council.

Options:

1. Receive and file this report. Direct the City Attorney to send a letter to Mr. Ledden and to Mr. Hartley indicating that the Council considered their letters and will not take further action with respect to the selection of the Mayor and Mayor Pro Tem at this time.

2. Reconsider the selection of the mayor similar to the reconsideration of the Mayor Pro Tem at the December 4 meeting:
    a. Rescind the action taken on November 21, 2019, to select the Mayor
    b. Accept public comment
    c. Take nominations for Mayor
    d. Vote on selection of Mayor

3. The same as Option 2 but include the selection of Mayor Pro Tem

Attachments:

1. Letter from Ken Hartley
2. Letter from Justin Ledden

Respectfully Submitted by: Michael Jenkins, City Attorney
Noted: Suja Lowenthal, City Manager