Staff Report

File #: REPORT 20-0514, **Version:** 1

Honorable Mayor and Members of the Hermosa Beach City Council
Regular Meeting of August 11, 2020

BROWN ACT DEMAND FILED BY KEN HARTLEY
PERTAINING TO CYPRESS DISTRICT ORDINANCE

(City Attorney Michael Jenkins)

Recommendation:

Staff recommends that the City Council:

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

Executive Summary:

In a letter dated July 21, 2020, Kenneth A. Hartley alleges violations of the Brown Act in connection with the Council's consideration of a text amendment to the M-1 Light Manufacturing Zone allowing for limited event permits for Cypress District businesses. This report analyzes the allegations and legal contentions set forth in the letter and concludes that the demand from Mr. Hartley pertaining to the February 25 meeting is untimely and that no violation of the Brown Act occurred at the February 25 or June 23, 2020 City Council meetings. Accordingly, no action to cure is legally required.

Background:

To promote transparency and to comply with the Brown Act, City Council meetings are open and public. All business items to be addressed by the City Council generally must be included on a publicly posted agenda. To further promote the goal of accountable government, the statute allows interested persons to "demand" the City cure or correct an action alleged to have been taken without complying with the Brown Act. This procedure allows the City either to account for its actions or take corrective action.

These written demands must be filed within 90 days from the date the action was taken or within 30 days if the action was taken at a public meeting on a non-agenda item. The Brown Act requires that the City Council determine whether it will cure or correct the challenged action within 30 days of receiving a timely demand (Government Code Section 54960.1(b)). If the City Council does not act within 30 days, the Council is deemed to have determined not to take any corrective action. No

lawsuit may be filed until after the City has a chance to respond to a demand to cure or correct.

The City takes every Brown Act allegation seriously, even when an allegation appears on its face to be without merit. In a letter dated July 21, 2020, Kenneth A. Hartley alleges violations of the Brown Act in connection with the Council's consideration of a text amendment to the M-1 Light Manufacturing Zone allowing for limited event permits for Cypress District businesses ("agenda item"). The demand letter from Mr. Hartley is attached (**Attachment 1**). It is this demand letter that requires the City Council's attention tonight.

Analysis:

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 the letter and then suggests a recommended course of action. The letter asserts that violations of the Brown Act took place at the February 25, 2020 and June 23, 2020 City Council meetings. The alleged violations are as follows:

1) At both meetings, Mayor Campbell failed to properly disclose a financial interest in the agenda item.

2) On February 25, 2020, Mayor Campbell improperly participated in the portion of the hearing wherein the Council voted to support the Mayor Pro Tem's motion to continue the hearing so that he could obtain a determination letter from the FPPC.

3) During the February 25, 2020 meeting, the Mayor Pro Tem did not allow the public to comment on the continuation of the agenda item.

4) Also on February 25, 2020, the Mayor Pro Tem failed to disclose a financial interest in the agenda item and to then recuse himself.

5) At the June 23, 2020 meeting, the Mayor Pro Tem failed to re-open public comment after Councilmember Fangary disclosed additional information regarding Mayor Campbell's financial interest in the agenda item.

For clarity's sake, these allegations will be addressed below in chronological order and shall be divided between the two meetings.

Allegation #1

In his letter, Mr. Hartley contends that, on February 25, 2020, Mayor Campbell was required to disclose a financial interest in a business she owned by alleging the following:

> "First, given the fact that Mayor Campbell owned a business in the zone that

> the text amendment would most benefit, she should have properly disclosed her financial interest and recused herself before the hearing even began…In accordance with government code 87105, Mayor Campbell had a duty to publicly disclose her financial interest in detail sufficient for the public to understand, recused herself from the matter and leave the room."

In fact, on February 25, 2020, the Mayor did not participate in a hearing on an agenda item as to which she had a conflict of interest. At the meeting's outset, during the agenda item entitled "Approval of the Agenda," the City Attorney recommended a continuance of the agenda item to allow time to obtain an FPPC opinion on an alleged conflict of interest on the part of Mayor Pro Tem Massey. The Council then voted to continue the item without comment or discussion. The agenda item was, in effect, removed from the agenda.

Earlier in his letter, Mr. Hartley suggests that "Mayor Campbell and the Council opened the item, quickly discussed [the item] and then voted to continue to the hearing." However, this statement is inaccurate. The public hearing item was never opened; as noted above, it was removed from the agenda during "Approval of the Agenda." Hence, the Mayor never participated in a public hearing on or in a discussion of the agenda item.

Mr. Hartley also suggests that Mayor Campbell may be subject to criminal penalties, under the Brown Act, for having attended a meeting "where action is taken in violation of any provision of [the Brown Act], and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under [the Brown Act]." (Cal. Gov. Code §54959.) However, as explained above, the item was removed from the agenda; hence, no action was taken on the matter on February 25, 2020. The reference to criminal prosecution is baseless.

Allegation #2

Next, Mr. Hartley alleges additional violations by the Mayor at the February 25, 2020 meeting, by way of the following:

> "[T]he Mayor improperly participated in the portions of the hearing on 2.25.2020. Instead of leaving, Mayor Campbell led the hearing and voted to support Mayor Pro Tem's motion to continue the hearing so he could obtain a determination letter from the FPPC."

As discussed above, the agenda item was removed from the agenda and was not opened for consideration or discussion. Furthermore, her participation in the vote to exclude the matter from the agenda was not prejudicial because all four of the remaining Councilmembers also voted to continue the agenda item. A claim for nullification may stand only where prejudice can be shown. (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 371 [citations omitted]; See also *Cohan v. City of*

Thousand Oaks (1994) 30 Cal.App.4th 547 ["Nonetheless, violations of the Brown Act do not invalidate a decision. [Citation omitted.] Appellants must show prejudice."].)

Allegation #3

Mr. Hartley's third allegation is as follows:

> "Mayor Pro Tem on portions of the hearing on 2.25.2020 did not allow the public to comment as part of public participation."

Although it is not clearly stated, the only discussion of the matter to which Mr. Hartley refers was the approximately one and a half minutes during the approval of the agenda portion of the meeting, when in response to the City Attorney's advice, the Council continued the agenda item. The Mayor Pro Tem was not presiding over the meeting at the time in question.

Section 54954.3(a) of the Brown Act governs the circumstances under which the public must be allowed to address a local legislative body. This Section requires that local legislative bodies allow members of the public to address an agenda item "*before or during consideration* of an agenda item." However, the agenda item was removed from the agenda and never considered. The Council is not required to take public comment on a purely housekeeping question of placing an item on or removing an item from its agenda. *Coalition of Labor, Agriculture & Business v. County of Santa Barbara Bd. of Supervisors* (2005) 129 Cal.App.4th 205, 209. Moreover, no person sought to speak on the item and therefore no one was denied that opportunity.

Allegation #4

Mr. Hartley also accuses the Mayor Pro Tem of failing to disclose his financial interests and recuse himself at the February 25, 2020 meeting by stating the following:

> "[A]t the 2.25.2020 hearing Councilmember Massey whom also was required to disclose his financial interest and recuse himself, instead made no such disclosures, participated in the hearing and actually made the motion to stop the very hearing that he should not have been part of so he could have time to craft a letter to the FPPC in an effort to later allow him to participate."

As explained above, the agenda item was not opened for public hearing. The Mayor Pro Tem participated in a vote to continue the item so that he could seek an FPPC opinion. Just prior to the February 25 meeting, the City received a letter from Jed Sanford asserting that Mayor Pro Tem Massey should recuse himself due to a conflict of interest. Mayor Pro Tem Massey elected to request an opinion from the FPPC. In an opinion dated May 15, 2020 (Opinion No. A-20-040), the FPPC concluded that Mayor Pro Tem Massey did not possess a conflict of interest that would bar

him from participating. Hence, Mr. Hartley's allegations pertaining to a supposed conflict of interest on the part of Mayor Pro Tem Massey are without merit.

In summary, I conclude that the allegations pertaining to the February 25 meeting are untimely under the Brown Act and, even so, because the only decision made on February 25 was not to hear the item by approving the agenda without the item, Mr. Hartley fails to raise a violation of the Brown Act.

Analysis of June 23, 2020 Meeting Allegations

Mr. Hartley also raises two allegations in his demand letter related to the June 23, 2020 Council meeting. These allegations have been raised within the statutory timeframe. However, for the reasons set forth below, the allegations do not constitute a Brown Act violation.

Allegation #4

The demand letter alleges that, during the June 23, 2020 meeting, the Mayor did not adequately disclose her conflict of interest in and recuse herself from the hearing. Mr. Hartley characterizes this allegation as follows:

> "[A]t the 6.23.2020 portion of the hearing, Mary Campbell once again failed to properly disclose her financial interest in Shockboxx Gallery. Instead, she chose to mislead the public by stating she had previously recused on the previous hearing when in fact she did not, participated, and voted. Additionally, rather than disclose her financial interest in the business this text amendment was designed to help, the Mayor recused due to her personal residence's proximity to the project."

First, as a factual matter, Mayor Campbell did not state that "she had recused" herself during the February 25, 2020 meeting. As Mr. Hartley points out in his demand letter, the Mayor stated only the following: "I would like to announce that I continue to be recused on this item based on the proximity of my home to the area under discussion." This statement merely reflects that a recusal under the Political Reform Act is for all purposes.

Second, at the outset of the public hearing on the agenda item, Mayor Campbell announced that she had a conflict of interest. In accordance with FPPC regulations, she then left the virtual meeting room and did not participate in the matter. I agree with Mr. Hartley that the Mayor should have mentioned both reasons for her recusal and I know that the Mayor understands that now. But, the fact that Mayor Campbell did not disclose the second basis for her conflict of interest does not constitute a violation of the Brown Act.

In any event, the Mayor's failure to announce the second basis of her conflict was not prejudicial. To the extent that the public has an interest in avoiding participation by members impaired by a conflict

of interest, that interest was satisfied by Mayor Campbell's recusal. Any action taken, therefore, would not be subject to nullification under Section 54954.3(a). Moreover, the second basis for her disqualification was documented in letters and emails that were part of the public record of the hearing. While not the ideal method of disclosure, this fact certainly helped the public be aware of the Mayor's husband's business interest. And, when the ordinance returned to the agenda for a second reading on July 14, Mayor Campbell announced the full extent of her conflict of interest prior to her recusal; no member of the public sought to speak at that time.

Third, Mr. Hartley's contention that the remaining, non-conflicted members of the Council were influenced by the well-known fact that Mayor Campbell's husband was seeking the zone text amendment is speculation and also not a ground on which to allege a Brown Act violation. The Brown Act does not govern the outcome of City actions, just the manner by which business is conducted.

Fourth, Mr. Hartley contends that the public was unaware of Mayor Campbell's interest in Shockboxx and that their testimony might have been different had they known. The public was, however, informed of the Mayor's second basis for conflict of interest in the agenda item by virtue of inclusion on the meeting agenda of the following public correspondence, all of which constituted public comment, commenting on Mayor Campbell's husband's ownership interest in Shockboxx:

Email from Kent Allen dated February 25, 2020
Letter from Jed Sanford dated February 25, 2020
Letter from Jed Sanford dated March 10, 2020
Email from Gary Clark dated June 16, 2020
Email from Kent Allen dated June 23, 2020
Letter from Jed Sanford dated June 23, 2020

Thus, the agenda provided information readily available to the public as to the fact that the Mayor's husband owns Shockboxx.

Finally, the failure to disclose the second basis for recusal is not a matter governed by the Brown Act. The Brown Act does not address recusal requirements under the Political Reform Act. The Mayor's the omission simply does not violate any provision of the Act.

Allegation #5

The final allegation raised in Mr. Hartley's demand letter relates again to the Mayor Pro Tem's alleged decision not to open the hearing to public comment and is stated as follows:

> "[A]t the June 23, 2020 hearing when key information regarding Mayor Campbell's undisclosed financial interest was disclosed by Councilmember Fangary after public comment, Mayor Pro Tem Massey failed to re-open

public comment given this new information."

The Council accepted public comment during the public hearing, which satisfies the Brown Act. Mr. Hartley's concern that public comment was not re-opened *after* the allotted period for public comment on the agenda item had expired does not state a violation of the Brown Act's public comment requirements.

Under Government Code section 54954.3, the City may make reasonable regulations governing public participation, such as, "regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." (Gov. Code §54954.3(b)(1).) On June 23, 2020, after receiving a report from the Community Development Director, the City Council opened this agenda item for public comment, and two members of the public spoke over the course of approximately six minutes. The Mayor Pro Tem asked repeatedly whether there were more individuals who wished to speak, and closed the public comment period only after having given every opportunity for such individuals to make themselves known. And, significantly, no member of the public requested to speak following Councilmember Fangary's comment; hence, no member of the public was denied the opportunity to comment.

In summary, I conclude that the allegations pertaining to the June 23, 2020 meeting fail to raise a violation of the Brown Act.

Conclusion:

Based on the foregoing, I conclude that the demand from Mr. Hartley pertaining to the February 25 meeting is untimely and that no violation of the Brown Act occurred at the February 25 or June 23, 2020 City Council meetings. Accordingly, no action to cure is legally required.

Recommendation:

Receive and file this report and direct the City Attorney to send the letter to Mr. Hartley attached as **Attachment 2** to this report indicating that the Council considered his letter and will not take further action with respect to his demand.

In the alternative, although it is my opinion that a cure is not legally required, should the Council desire to undertake a cure, it would direct staff to place an item on a future agenda to repeal the ordinance at issue and schedule a public hearing to reconsider it.

Attachments:

1. Complaint dated July 2, 2020 from Mr. Ken Hartley
2. Proposed letter to Mr. Hartley

Respectfully Submitted by: Michael Jenkins, City Attorney

Concur: Suja Lowenthal, City Manager