

October 15, 2013, Finance Committee Agenda Comments

These comments on items on the Newport Beach City Council Finance Committee agenda are submitted by: Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, Newport Beach 92660 (949-548-6229)

Item 4: Approval of Minutes of July 22, 2013, Meeting

The following three very minor corrections are suggested for the Committee's consideration:

1. Page 3, under item B, paragraph 2, last sentence: "*He commented **on** the main risk portfolio duration, interest rate changes, credit exposure, and uncertain cash flows.*"
2. Page 4, paragraph 3: "*The third recommendation is to establish another reference point that is more reflective of **the** universe of investable securities ...*"
3. Page 4, paragraph 6: "*Council Member Henn, with Council Member Petros' concurrence stated support for the three recommendations.*"

Although not incorrect, I feel that under Item 6 on page 4 ("*Announcements or Matters Which Members Would Like Placed on a Future Agenda*"), the discussion regarding setting a date for review of the "*trash RFP analysis*" was considerably more precise than the draft minutes might suggest. According to my notes, City Manager Dave Kiff said that before taking them to the full Council, he would like to have the Committee review the trash proposals in August or early September. After consulting calendars, a time and date of 4:00 pm on August 15, 2013, was set, subject to Dave checking that Mark Harmon would be "ready" by then. It was also noted that after August 15th, the next meeting of the Finance Committee would be on September 23, 2013.

[Further note regarding events after the July 22 meeting: the August 15 meeting was subsequently changed to August 29 at 3:00 pm, per an email from Tammie Frederickson on July 26. The August 29 meeting was cancelled, but the September 23 date confirmed, in an email received on August 21, 2013. The September 23 meeting was never held.]

Item 5.A.: Response to Ralph M. Brown Act Allegations

This agenda item consists of a draft letter, apparently to be signed by the Chair if a majority of the Committee agrees, in response to a "cease and desist" letter received by the City on September 17, 2013. I find it curious that staff has chosen not to share the September 17th letter with the public and the Committee members as part of the agenda packet. I am attaching what I assume is it as "Exhibit A."

As my September 17 letter says, I submitted it pursuant to a new mechanism added to the Brown Act in January of this year (found in California Government Code Section 54960.2). As I thought the letter made very clear, it raises a significant concern about members of three member committees subject to the Brown Act discussing matters within their committee's subject matter jurisdiction outside of publicly noticed meetings, and asks the Finance Committee to refrain from that practice in the future. Should the Committee agree that refraining from unnoticed discussion would be good public policy, the new mechanism provides a face-saving way of committing to that policy without any admission that past practice might have been incompatible with the Brown Act. At the same time, if the public were to notice the Committee

reverting to the practice of holding unnoticed discussions between members, it reserves to the public the right to have the question of whether that practice violates the Brown Act settled by a court.

I am profoundly disappointed by the response letter proffered in the agenda packet. Not only does it not acknowledge the challenged pass practice of unnoticed discussions between Committee members, but it implies that any concern about such non-public discussions as one assumes must have preceded the *Daily Pilot* commentary is entirely frivolous, and it commits *unconditionally* to nothing.

Instead, it cites the letter published in the *Daily Pilot* as the challenged “action” (even though the letter is only the *evidence* or *symptom* of the challenged action), and, as best I can tell, “agrees” *only* to not publishing it again. Should the Committee issue the letter as drafted, I, for one, am doubtful it is a promise to refrain from future unnoticed discussions between members. As such, the draft “unconditional commitment” meets neither the letter nor the spirit of the new mechanism.

I had hoped that the new mechanism would provide a basis for a candid public discussion of whether refraining from unnoticed discussions is good public policy, or not. I am open to the idea that there might be policy arguments favoring unnoticed discussions, or that I might be misreading what I read (for the reasons explained in detail in “Exhibit A”) as the existing prohibition against them in the Brown Act. And I remain hopeful, although I have difficulty seeing how the proposed response advances the conversation, or in any way protects the City.

Should a conversation take place, it might be helpful to note that although I found the *Daily Pilot* commentary particularly troubling because it dealt with matters that had been explicitly and publicly announced to be discussed at a public meeting of the Finance Committee (see notes to Item 4, above), it is irrelevant to me whether the matter was planned for a Finance Committee agenda or if the Committee ultimately took action on it. In my view, the Brown Act wisely prohibits *any* non-public discussion among members of a three-member committee on *any* topic that *could* come before the committee. Without that restriction, the distinction between agendized meetings and private conversations becomes hopelessly blurred. I fully understand that some Council members may feel uncomfortably constrained by this restriction, but my answer is that those who want to discuss a subject “off camera” should not volunteer to serve on a three-member committee dealing with that subject matter. The hardship is no greater than that imposed on the members of a two-member standing committee of a five-member council.

I fully appreciate that the enforcement of any resulting commitment would be largely on the honor system, since the public rarely knows what committee members are doing in private, but I do not believe that should not restrain the committee from wanting to commit to the principle that the public’s business should be done exclusively in public.

I look forward to an unconditional commitment to refraining from any unnoticed discussions between members of a three member body subject to the Brown Act.

Exhibit A

2210 Private Road
Newport Beach, CA. 92660
September 17, 2013

City Clerk
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA. 92660

Madam Clerk,

This letter is being reluctantly submitted pursuant to California Government Code Section 54960.2(a)(1) to request the City of Newport Beach to take the steps necessary to cease and desist from the Brown Act violation described below.

On December 12, 2000, the City Council created, by Resolution 2000-103, a three-member standing Finance Committee, whose duties and membership, currently consisting of three City Council members, were most recently revised by Resolution No. 2007-21 (April 10, 2007) and Resolution No. 2013-32 (April 9, 2013).

As Item E on its March 25, 2013 agenda, and presumably within the recognized scope of its subject matter jurisdiction, the Finance Committee met for "*Review of the Request for Proposal (RFP) Outline for the Residential Solid Waste Program.*" At its July 22 meeting the City Manager further asked the Committee to convene a special meeting on August 29 to review the results of that RFP prior to their presentation to the full Council. The requested Finance Committee meeting was never held. Instead, the first noticed public meeting at which the RFP results were discussed was the full City Council meeting of September 10, 2013, where the discussion was Regular agenda Item 20.

However, prior to the September 10 meeting, and without benefit of the planned August 29 public meeting, two of the three Finance Committee members, Mayor Keith Curry and Councilmember Michael Henn, who constitute a majority of the Committee, published a lengthy commentary in the City's official newspaper, the *Daily Pilot*. Their commentary, describing in detail their financial conclusions regarding the trash out-sourcing proposals and the savings that could be realized, appeared on-line on September 6, and in print on

September 8, 2013, where it was titled “*Outsourcing trash pickup would free money city needs*” (page A8).

It is evident that in composing this commentary, and arriving at their joint conclusions, these two gentlemen must have discussed the RFP results, either in person, telephonically or electronically. That is a clear violation of Government Code Section 54952.2 (b)(1), which prohibits a majority of a body subject to the Brown Act (such as a standing committee) from discussing, outside of a noticed public meeting, business that could properly come before the body.

It might be noted that Section 54952.2(c)(1) exempts individual contacts between members of the body, however such contacts are exempted only to the extent they would not violate Section 54952.2 (b). In the present case, individual contacts between any two members of the Finance Committee regarding matters within the subject matter jurisdiction of the Finance Committee clearly violate Section 54952.2 (b)(1) because they constitute discussion among a majority of the membership of the three member committee. Therefore, they are not exempted.

I trust the City will recognize this problem and take the steps prescribed in Government Code Section 54960.2(c)(1) to commit to preventing future unnoticed discussion between any members of a three member committee subject to the Brown Act noticing requirements regarding matters within the jurisdiction of such committee.

Yours sincerely,

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