



# CITY OF LODI

# COUNCIL COMMUNICATION

AGENDA TITLE: Request by Stockton Record for Corrective Action Regarding the Brown Act.

MEETING DATE: November 3, 1993

PREPARED BY: City Attorney

RECOMMENDED ACTION: Council consideration and direction to staff; possible rescission of October 6, 1993 vote.

BACKGROUND: At the October 6, 1993 City Council meeting, under the Agenda item for "Comments by City Council Members on non-agenda items", Mayor Phil Pennino distributed a letter he prepared (Attachment 1) addressing an incident involving Council Member Ray Davenport and the City Manager. Mayor Pennino read the letter into the record and at the conclusion of the reading, made a motion that the City Attorney be directed to research the issue of policies and rules for Council conduct, and to place it on a future Agenda for discussion and possible action. The motion was seconded by Council Member Mann. Following comments by Council Member Davenport on his October 1, 1993 meeting with the City Manager, the Council voted 4 - 1 to bring the matter back at a future date with information from the City Attorney.

The City has now received a letter from the Stockton Record (Attachment 2) alleging that the vote constituted a violation of the Ralph M. Brown Act (Government Code Section 54950 et seq.) also known as California's "Open Meeting" law, since the subject voted on did not appear on the Agenda. Although not specified in the Newspaper's letter, I assume the portion of the Brown Act referred to is Section 54954.2(a) which states in pertinent part "No action shall be taken on any item not appearing on the posted Agenda".

While reasonable minds may differ, I must respectfully but firmly disagree that any violation of the Brown Act occurred.

While the October 6 Agenda obviously did not contain an item referring to this subject, it seems reasonable to characterize what occurred as Council direction to the City Attorney to research the issue raised and return at some unspecified future Council meeting for possible action at that time. The fact that this direction was given by way of a Council vote is irrelevant in my view, since under Lodi Municipal Code Section 2.04.180[B] (Attachment 3), any single member of the Council, or the City Manager, City Clerk, or City Attorney individually can put items on future Agendas. I fail to see how it violates the Brown Act if a majority of the Council desires to do the same thing any individual member could appropriately do.

APPROVED \_\_\_\_\_

THOMAS A. PETERSON  
City Manager



recycled paper

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This opinion is further reinforced by language contained in the "Open Meeting Laws" handbook prepared by the California Attorney General's office (Attachment 4) on the issue of "action taken" by public bodies on matters not appearing on the Agenda. The Attorney General's office said:

"In our view, Section 54954.2 does not prohibit brief discussions of procedural or preliminary matters which are not substantive in nature (e.g., time and place of future board meetings, a decision to place a matter on a future agenda, instruction to staff to gather information and return to a future board meeting with a report, etc." (emphasis added)

This seems to me entirely consistent with what the City Council did October 6; that is, the Council directed staff to prepare information and return at a future Council meeting. While the Attorney General did not cite cases in support of this position, and I have been unable to locate any California case exactly on point, the Attorney General's opinion or interpretation of statutes is "entitled to great respect" by California courts (Sonoma County Board of Education v. PERB (1980) 163 Cal.Rptr.464). Based on the Attorney General's handbook, I have in the past advised the City boards and bodies that it is permissible to put items for consideration on future agendas at any time, even though the topic was not on the agenda at which the request to do so was made.

Occasionally, where no relevant California cases are found, courts will look to the decisions of other states for guidance in similar situations. Using this approach, I found Judge v. Pocius (1977) 367 A.2d 788, in which Pennsylvania's open meeting law was examined under similar circumstances. The Pennsylvania court found no violation where the "exchange among [school board] members was not a vote on [the] issue of closing four elementary schools but was merely a discussion as to whether or not [the] matter should be placed upon [the] agenda of [a] public board meeting to be held in the future (emphasis added).

For the reasons stated above, I still believe that the Brown Act was not violated. Having said that, I must now suggest to the Council that it consider voiding the vote taken on this issue for the following practical reasons. Under Government Code Section 54960.1, the letter from the Newspaper is a procedural step preliminary to filing a lawsuit, so I assume the Newspaper is prepared to go forward with litigation. If the Council rescinds its action (or in the language of the statute "cures" a challenged action), then under Section 54960.1(d), any lawsuit filed would be dismissed with prejudice. While I am reasonably comfortable with the City's chances of successfully defending the Council action, I am not sure the result would justify the time and expense of doing so.

If it wishes, the Council could rescind the October 6 vote and the matter could subsequently be brought back at some future meeting, using the provisions of Lodi Municipal Code Section 2.04.180(b) to place it on a later Agenda. That would eliminate any basis for litigation and allow the Council to take the matter up again in the future. Should this option be chosen, it may also be in the

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City's interest to request from the Attorney General an opinion further clarifying the situation by a more specific examination of the hand book's language on "action taken" as it relates to a vote to place matters on future Agendas.

FUNDING: Unknown.

Respectfully submitted,

  
Bob McNatt  
City Attorney

BM/vc

Attachments

cc: Debra Corbett, Esquire  
President, Central Valley City Attorney's Assn.

Date: October 6, 1993

To: Council Members  
City Manager  
City Attorney

From: Mayor Phil Pennino

On Friday, October 1, an incident took place which needs to be addressed.

On that day a Council Member came to the City Manager's office in the afternoon and spent several hours in the conference room (I assume for the purpose of conducting City business). Towards the end of the work day, the Council Member went into the City Manager's office to discuss issues which affected the City of Lodi.

This is nothing new, and we as Council Members are encouraged to meet with the City Manager to discuss those issues that do affect the City. However, in a previous meeting with this Council Member, several verbal remarks were made towards the City Manager. Since that verbal accusation has occurred, the City Manager has requested that a third party be present in the room when discussing City business with this Council Member.

On October 1, the Council Member entered the City Manager's office, in his absence and without his consent, with a camera and tape recorder for the obvious purpose of confrontation. The Council Member photographed the Manager's office, desk and tape recorded their subsequent conversation. He disrupted business, upset the clerical staff and behaved in a way most people would consider totally unacceptable.

After discussing this occurrence with several City employees including the Council Member, I must ask the other Council Members to join me in directing the City Attorney to research and draft some policies and rules of conduct for ALL Council Members.

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Some points include:

1. Acknowledge the privacy of employee work places from intrusion by Council Members, without justification.
2. Delegate to the City Manager, the authority to remove from some City buildings and offices not generally open to the public anyone (including Council Members) who is not there on legitimate City business or who is disrupting normal business.
3. Limit the type and amount of documents and reports any single Council Member can request from the City Manager or individual departments without approval and concurrence from the rest of the Council Members.

My fellow Council Members, it saddens me deeply that we have to establish these policies. However, as Mayor and Council Members for the City of Lodi, we have a duty to maintain a safe and productive work environment for our employees.

Therefore, I would like to make a motion to direct the City Attorney to research policies and rules for Council conduct and to return to the Council with information for discussion and possible action.

# The Stockton Record

ATTACHMENT 2

20 Oct. 1993

03 OCT 22 AM 11:54

PHILLIP M. PENNINO  
CITY CLERK  
CITY OF LODI

The Honorable Phillip A. Pennino  
Mayor  
City of Lodi  
221 W. Pine St.  
Lodi, Calif. 95240

Dear Phil:

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 a recent action taken by the Lodi City Council.

The nature of the violation is as follows. In its meeting of Oct. 6, 1993 the City Council took action on your request to direct the City Attorney to research and draft rules of conduct regarding members of the City Council. The vote was 4-1; Councilman Ray Davenport in opposition.

The action taken was not in compliance with the Brown Act because there was no adequate notice to the public on the posted agenda that the matter to be acted on would be discussed and there was no finding of fact by the City Council that urgent action was necessary on a matter unforeseen at the time the agenda was posted.

In the event it appears to you that the conduct of the council specified herein did not amount to the taking of action, I call your attention to Government Code Section 54952.6 which defines "action taken" for purposes of the Act very expansively.

As you may be aware, 1986 amendments to the Act created a new legal remedy for illegally taken actions allowing judicial invalidation of the action. Pursuant to Government Code Section 54960.1, I demand that the City Council cure or correct the illegally taken action as follows: formally withdraw the motion of Oct. 6 and post the proposal on an upcoming agenda to allow for public review and comment; include in the agenda packet all supporting materials relating to the proposal; suspend all staff action on the motion until it is given proper agenda notification and public review.

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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 do not cure or correct as demanded, I am entitled to seek judicial invalidation of the action pursuant to Section 54960.1 in which case I would seek the award of court costs and reasonable attorney fees pursuant to Section 54960.5.

I look forward to your reply, Phil.

Respectfully yours,



Richard Hanner  
Lodi bureau chief  
The Stockton Record

cc: Bob McNatt, Lodi city attorney  
Gannett Co. corporate counsel, Rosslyn, Va.  
Thomas W. Newton, chief counsel, the California  
Newspaper Publishers Association, Sacramento.  
Terry Francke, executive director, the First  
Amendment Coalition, Sacramento.

**Chapter 2.04**

**CITY COUNCIL MEETINGS**

**2.04.180 Preparation of agendas.**

A. Consistent with the provisions of the Ralph M. Brown act (Government Code Section 54950 et seq.), the agenda for Council meetings shall be prepared by the city manager, and distributed by the city clerk.

B. Matters may be placed on the agenda for consideration by the city council by request of:

1. Any member of the city council;
2. The city manager;
3. The city clerk;
4. The city attorney.

C. Any reasonable request by any person named in this section to place a matter on the agenda shall be honored, subject to the city manager's discretion as to the preparation of accompanying staff reports. (Ord. 1566 § 1 (part), 1993)

**OPEN**

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**MEETING**

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**LAWS**

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**JOHN K. VAN DE KAMP**  
Attorney General

**NELSON KEMPSKY**  
Chief Deputy Attorney General

Prepared by the Civil Division:

**RICHARD D. MARTLAND**  
Chief Assistant Attorney General

**N. EUGENE HILL**  
Assistant Attorney General

**TED PRIM**  
Editor  
Deputy Attorney General

Yet, the first sentence specifically requires that discussion items as well as matters to be transacted must appear on the agenda.

To date, neither a court nor this office through formal opinion has resolved this issue. In light of the Brown Act's strong policy in favor of openness, and the specific wording of the first sentence of section 54954.2, we think it is likely the future court rulings will conclude that the discussion items, as well as the taking of action, are subject to the 72-hour agenda requirement. The obvious purpose of an agenda requirement is to make certain that interested members of the public are properly notified about the future business of their legislative body. To the extent that background information is provided, view points are exchanged, and perhaps ideas begin to crystalize in the minds of members of the legislative body without the participation of interested members of the public who did not receive notice of such discussions through the published agenda, the Brown Act's policy of involving members of the public in the information acquisition and deliberative phases of the decision-making process would have been defeated. The right of the public to participate in all phases of the decision-making process has been repeatedly stated by the courts and this office. (See Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d 95; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra, 263 Cal.App.2d 41; 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820 (1980).) Accordingly, we conclude that discussion as well as the taking of action is subject to the 72-hour agenda requirement.

Undoubtedly, a host of interpretative problems will arise when one attempts to apply the statutory prohibition to real-life situations. In our view, section 54954.2 does not prohibit brief discussions of procedural or preliminary matters which are not substantive in nature (e.g., time and place of future board meetings, a decision to place a matter on a future agenda, instruction to staff to gather information and return to a future board meeting with a report, etc.). Substantive issues raised either by staff or by a member of the board which do not appear on the agenda should not be discussed until a subsequent meeting.

Phil:

Please let me know if you have any  
questions or comments.

Best,

A handwritten signature in black ink, appearing to be 'Phil', written in a cursive style.

# The Stockton Record

20 Oct. 1993

The Honorable Phillip A. Pennino  
Mayor  
City of Lodi  
221 W. Pine St.  
Lodi, Calif. 95240

OCT 22 AM 11:54

PHILLIP A. PENNINO  
CITY CLERK  
CITY OF LODI

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I look forward to your reply, Phil.

Respectfully yours,

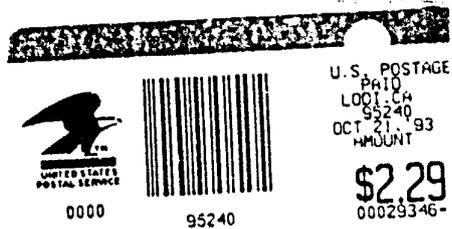
A handwritten signature in black ink, appearing to read "Richard Hanner". The signature is written in a cursive, flowing style with a large initial "R".

Richard Hanner  
Lodi bureau chief  
The Stockton Record

cc: Bob McNatt, Lodi city attorney  
Gannett Co. corporate counsel, Rosslyn, Va.  
Thomas W. Newton, chief counsel, the California  
Newspaper Publishers Association, Sacramento.  
Terry Francke, executive director, the First  
Amendment Coalition, Sacramento.

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**The Stockton Record**

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Mayor Phillip A. Pennino  
Lodi City Hall  
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