



Western
Manufactured Housing Communities
Association



September 24, 2021

Via US Mail and Facsimile to (714) 647-6954

Santa Ana City Council
Attn: Daisy Gomez, Clerk of the Council
P.O. Box 1988, M-30
Santa Ana, CA 92702

cc: Kristine Ridge, City Manager and Sonia R. Carvalho, City Attorney

Re: Demand to Cure or Correct Violations of the Ralph M. Brown Act and Cease and Desist from Such Practices (Gov. Code Sec. 54960.1 & 54960.2)

Dear Mayor Sarmiento, Members of the City Council, and Clerk Gomez:

On behalf of a coalition comprised of the region’s businesses, property owners, investors, developers, managers and suppliers of rental homes, REALTORS®, and manufactured housing communities, we write to call your attention to substantial violations of the Ralph M. Brown Act (Gov. Code Sec. 54950, et seq.) (hereinafter “Brown Act”) by the Santa Ana City Council (hereinafter “Council”). This letter hereby demands, pursuant to Gov. Code Sec. 54960.1 & 54960.2, that the Council cure, or correct as well as, cease and desist from, and not repeat, the violations of the Brown Act described herein.

The challenged actions of the legislative body and nature of the alleged violations are as follows:

Violation #1: The Housing Ad Hoc Committee is, in Reality, a Standing Committee Subject to the Brown Act

On or about March 2, 2021, the Mayor and City Council formed a Housing Ad Hoc Committee. The Housing Ad Hoc Committee members consist of Mayor Sarmiento and Councilmembers Lopez and Phan. According to the staff report for item 33 on the agenda for the September 21, 2021 Council meeting, “The [Housing Ad Hoc] Committee convened its first meeting on March 22, 2021, and has since conducted four additional meetings to discuss various housing issues.”

Because the City takes the position that the Housing Ad Hoc Committee is not subject to the Brown Act, none of these meetings have complied with Brown Act requirements pertaining to notice, agenda, access, and public comment. (Ref: Gov. Code Sec. 54953(a), 54954(a), 54954.2(a), 54954.3(a)). The Housing Ad Hoc Committee has taken action, as that term is defined in Gov. Code Sec. 54952.6, by agreeing to recommendations and delivering those recommendations to the Council in the form of two ordinances regarding rent control and just cause eviction requirements, agendized as item 33 on the September 21, 2021 Council meeting. The Council then took action upon the Housing Ad Hoc Committee's recommendations by passing on first reading the two ordinances drafted at the direction of the committee.

At the September 21, 2021 meeting, Mayor Sarmiento described the Housing Ad Hoc Committee's program of work as follows: "When I convened this Ad Hoc Committee earlier this spring, I told everybody publicly these are the three enumerated items we're going to be tackling: the housing opportunity ordinance, rent stabilization, and the general plan. Go look at the minutes." Contrary to the Mayor's assertion, the minutes for the March 2, 2021 meeting do not indicate any such scope of the Housing Ad Hoc Committee's work, nor do they provide any indication of when the work of the Housing Ad Hoc Committee will cease¹.

Even if Mayor Sarmiento's description of the Housing Ad Hoc Committee's scope of work is to be considered binding, the breadth of that program of work coupled with the fact that there is no time limit for the committee to complete its work strongly suggest that the Housing Ad Hoc Committee is functioning as a standing committee of the Council, rather than a true ad hoc committee.

The provisions of the Brown Act apply to "legislative bodies." Gov. Code Sec. 54952(b) defines the term "legislative body" as including: "A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter."

The Council relies on the second sentence of Gov. Code Sec. 54952(b) for its position that the Housing Ad Hoc Committee is not subject to the Brown Act. This is clear from the following exchange between Mayor Sarmiento and the City Attorney at the September 21, 2021 Council meeting:

Mayor Sarmiento: "To those of you who say Ad Hocs are secret. Madam City Attorney, are Ad Hocs legal to convene on a deliberative body like this?"

City Attorney: "You may, so long as it's less than a quorum of the City Council."

Mayor Sarmiento: "Okay. Can you assure the public that this Ad Hoc has no more than three members, which is less than a quorum?"

City Attorney: "Yes. In the meetings that were attended with members of my office there were only three members of the City Council in attendance."

¹ A copy of the relevant page of the minutes for the March 2, 2021 meeting is included herein.

Setting aside the Mayor's casual disregard of concerns about the policy issue created by the lack of transparency by hiding behind legal formalities, this exchange shows that the Council is relying *exclusively* on the fact that the Housing Ad Hoc Committee is comprised of less than a quorum of the Council in support of its position that the Brown act does not apply. This is a grievous error that ignores both the spirit and letter of the law.

With respect to the spirit of the law, the Legislature has declared “public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” (Gov. Code Sec. 54950). Given this clear statement of legislative intent, courts have found that “[t]he Brown Act's provisions must be ‘construed liberally in favor of openness in conducting public business.’” (*Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 601, review denied (June 30, 2021)). The fact that broad swaths of housing policy – issues that are of the utmost important in light of California’s housing crisis – have been delegated to the Housing Ad Hoc committee to debate outside of public view is, in and of itself, contrary to the spirit of the Brown Act. The manner in which the Housing Ad Hoc Committee has conducted its business – meeting in secret and delivering two fully drafted ordinances for a mere up to down vote under the false pretense of emergency – only compounds that concern.

The letter of the law likewise contradicts view of the Mayor and City Attorney that the Housing Ad Hoc Committee is exempt from the Brown Act, as their view ignores entirely the latter portion of the second sentence of Gov. Code Sec. 54952(b), which provides an express limitation on the exception for ad hoc committees² when it states: “[E]xcept that standing committees of a legislative body, **irrespective of their composition**, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.” [emphasis added]. The fact that the statute provides that standing committees – which are framed as an explicit check on the exemption for ad hoc committees – are “legislative bodies” *irrespective of their composition* forces a conclusion that a committee made up of less than a quorum of the legislative body *may* be a considered a legislative body. Thus, inquiry beyond simply the composition of the committee must be considered.

The words of the statute indicate that the additional considerations which must be taken into account to determine whether a committee is an ad hoc committee, and thus exempt from the Brown Act, or a standing committee subject to the Brown Act are: (1) whether the committee is formed on a temporary basis (the term “standing” connotes a committee that persists over a long period of time), and (2) either that the committee has continuing subject matter jurisdiction or that the committee meets on a regular schedule fixed by the legislative body³. A committee that is not temporary in nature and which either has continuing subject matter jurisdiction or has a fixed meeting schedule is a standing committee. By process of elimination, then, an ad hoc committee is a temporary committee that has neither continuing subject matter jurisdiction nor a fixed meeting schedule.

This interpretation is confirmed by none other than the League of California Cities, which describes ad hoc committees as follows in its well-known and respected publication *Open & Public IV: A Guide to the Ralph M. Brown Act*: “A **temporary** advisory committee composed solely of less than a quorum of the legislative body **that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed** is not subject to the Brown Act.” [emphasis

² The Brown Act does not use the term “ad hoc committees,” it instead refers to “advisory committees.”.

³ See also 79 Ops.Cal.Atty.Gen. 69, (1996) discussing the characteristics of standing committees.

added]. The determination of whether a committee is an ad hoc committee or standing committee is based on the function of the committee, rather than its form, to prevent subterfuge and evasion of the Legislature's purposes. (See 79 Ops.Cal.Atty.Gen. 69, (1996) “We thus follow function over form in carrying out the Legislature's purposes.”; see also *Frazier v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 792 “We must give that section a broad construction to prevent evasion.”)

Looking at the function of the Housing Ad Hoc Committee, it appears to fit more closely into the mold of a standing committee than a true ad hoc committee.

First, with respect to whether the committee’s work is temporary in nature, the minutes for the meeting at which the Housing Ad Hoc Committee was formed provides no indication as to when the work of the committee will cease. Indeed, the fact that the Housing Ad Hoc has now been in existence for more than six months and there is no defined timeline for when its work will conclude.

Second, the Housing Ad Hoc Committee does not serve “a limited or single purpose.” Rather, its program of work is incredibly broad – even if consideration is limited to just those items enumerated by Mayor Sarmiento – including the City’s long-range land use, zoning, and development policies⁴, affordable housing construction mandates, rent control, rental protections for tenants and mobilehome owners, just cause eviction policies, and tenant displacement and protection policies. Indeed, there does not appear to be any aspect of municipal housing policy not within the Housing Ad Hoc Committee’s scope.

In light of the above, the Housing Ad Hoc Committee’s function skews much more closely to a standing committee than a true ad hoc committee. When viewed in the context of the judicial mandate that Brown Act must be “construed liberally in favor of openness in conducting public business” it becomes clear that any ambiguity must be resolved in favor of openness and a finding that the Housing Ad Hoc is subject to the Brown Act. (See *Julian Volunteer Fire Co. Assn., supra.*)

Violation #2: The Mayor Violated the Brown Act’s Prohibition on Serial Meetings

In addition to the serious question of whether the Housing Ad Hoc Committee is, in fact, an ad hoc committee exempt from the Brown Act, the September 21, 2021 Council meeting revealed that Mayor Sarmiento violated the Brown Act by engaging in a serial meeting in violation of Gov. Code Sec. 54952.2(b)(1), which states: “A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.”

As discussed above, the Housing Ad Hoc Committee consist of three members: Mayor Sarmiento and Councilmembers Lopez and Phan. On September 9, 2021 and September 15, 2021, the Housing Ad Hoc Committee convened and directed staff to, among other things, draft a rent stabilization ordinance and a just cause eviction ordinance. These ordinances were placed on the agenda for the September 21, 2021 Council meeting and recommended for passage by the Housing Ad Hoc Committee.

⁴ Indeed the scope of the City’s current 900-page general plan, as the name indicates, governs a wide variety of topics related to housing policy, including growth management, conservation, and urban design.

During the September 21, 2021 Council meeting, Mayor Pro Tem Penalzoza expressed serious concerns about the lack of transparency and stakeholder outreach in the process followed by the Housing Ad Hoc Committee. Specifically, emphasizing the frustration expressed by members of the public about the fact that two urgency ordinances that represented a drastic change in city housing policy were being brought forward with just three days' notice, Mayor Pro Tem Penalzoza made the following statement: "Well... I don't want to brag, I had four days' [notice]. I found out the day before that this was coming before us. It was actually a phone call by the Mayor to give me the heads up. I had no idea this was coming, but you know, he gave me that courtesy. Now I won't go into too much detail about the conversation, but I didn't feel that there was – I see this is [put] forward as an urgency ordinance – but from the conversation I didn't get that there was an urgency from the Mayor. And I'll just leave it at that."

Mayor Pro Tem Penalzoza's statement indicates that, at a minimum, Mayor Sarmiento included a fourth member of the Council – thus constituting a majority – in discussion of the proposed ordinances outside of a public meeting. This is a clear violation of Gov. Code Sec. 54952.2(b)(1), which prohibits discussion or deliberation regarding any item of business that is within the subject matter jurisdiction of the legislative body among a majority of the members of the Council outside of a properly noticed meeting pursuant to the Brown Act. Most concerning is that the Mayor appears to have gone beyond merely advising Mayor Pro Tem Penalzoza of the recommendations being brought forward – itself a violation – but he apparently discussed the substance of the recommendation enough to leave Mayor Pro Tem Penalzoza with the impression that there was not an urgency to the situation. This indicates a more serious degree of violation and begs the question of whether the Mayor made similar phone calls to the remaining members of the Council.

It is of no consequence that the Mayor and Mayor Pro Tem do not appear to have reached any agreement. It is enough that the matter was discussed or deliberated. "Deliberation in this context connotes not only collective decision making, but also 'the collective acquisition and exchange of facts preliminary to the ultimate decision.'" (*Frazer, supra*, at 794.)

Conclusion

The violations of the Brown Act discussed above have had a serious impact on the public trust and confidence in the Council. But more concerning than these specific violations is the fact that these violations are merely a symptom of the underlying problem that certain members of this Council do not appear to value or respect the role the public has to play in the development of important public policy that will have ramifications within the City of Santa Ana for decades.

The members of this coalition implore you: do the public's business in public. Conduct stakeholder outreach. Consider alternative views. Accept constructive feedback. And then, only after thorough deliberation, make a decision about whether to move forward with legislation. These are the values the Brown Act was intended to make law, and it is these values that result in sound public policy.

Accordingly, with respect to Violation #1 outlined in this letter, it is hereby demanded pursuant to Gov. Code Sec. 54960.1 that the Council cure or correct the action by taking no further action on the two ordinances included in item 33 of the September 21, 2021 Council meeting until such time that the City: 1) conducts robust stakeholder outreach on the policies identified in item 33 on the September 21, 2021 Council meeting agenda, and 2) disbands the Housing Ad Hoc Committee or establish it as a standing committee that fully complies with the Brown Act.

As provided by Gov. Code Sec. 54960.1, you have 30 days from the receipt of this demand to either cure or correct the challenged action or advise of your decision not to do so. In addition, the Housing Ad Hoc Committee must, pursuant to Gov. Code Sec. 54960.2, cease and desist from conducting any further meetings that do not comply with the Brown Act.

With respect to Violation #2 outlined in this letter, pursuant to Gov. Code Sec. 54960.2, it is hereby demanded that Mayor Sarmiento cease and desist from, outside a meeting authorized by the Brown Act, using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the Council.

The members of the coalition reserve their rights to pursue the remedies provided for in Gov. Code Sec. 54960, 54960.1, and 54960.2 should any of the demands of this letter not be met.

Any written response to this demand may be addressed to Whitney Prout, legal counsel to the California Apartment Association, and provided via email to wprout@caanet.org.

Respectfully,

David Cordero, Executive Director
Apartment Association of Orange County (AAOC)

Adam Wood, Vice President
Building Industry Association of Southern California (BIASC)

Victor Cao, Senior Vice President, Local Public Affairs
California Apartment Association - Orange County (CAA)

Vickie Talley, Executive Director
Manufactured Housing Educational Trust (MHET)

Carolyn Cavecche, President & CEO
Orange County Taxpayers Association (OCTax)

Phil Hawkins, Chief Executive Officer
Pacific West Association of REALTORS® (PWR)

Julie Paule, Regional Representative for Orange, Riverside & San Diego Counties
Western Manufactured Housing Communities Association (WMA)

ABSENT: 0

Status: 7 – 0 – 0 – 0 – **Pass**

30. Ordinance Establishing Premium Pay for Grocery Workers and Retail Pharmacy Workers

Department(s): City Managers Office, City Attorneys Office

Recommended Action: Consider one of the following options:

1. Adopt an urgency ordinance establishing premium pay for grocery workers and retail pharmacy workers. *(Requires five affirmative votes)*
2. Approve first reading of an ordinance establishing premium pay for grocery workers and retail pharmacy workers.

MINUTES: *Management Assistant Daniel Soto provided a brief presentation.*

Moved by Councilmember Phan, seconded by Councilmember Lopez to approved Urgency Ordinance No. 3002 with amended language to change definition of “Grocery Store” to 10,000 square feet..

YES: 5 – Phan, Lopez, Bacerra, Hernandez, Sarmiento

NO: 2 – Penaloza, – Mendoza

ABSTAIN: 0

ABSENT: 0

Status: 5 – 2 – 0 – 0 – **Pass**

31. Establish City Council Ad Hoc Committees: Solid Waste, Housing, School Collaboration, and Homeless Ad Hoc Committees

Department(s): City Manager Office, City Attorney Office

Recommended Action: It is recommended that the Mayor establish the following City Council ad hoc committees:

1. Solid Waste Ad Hoc Committee
2. Housing Ad Hoc Committee
3. School Collaboration Ad Hoc Committee
4. Homeless Ad Hoc Committee

MINUTES:

- *City Manager Kristine Ridge provided a brief presentation.*
- *Mayor Sarmiento established members to serve on the following Ad Hoc committees:*
 1. *Solid Waste Ad Hoc Committee – Councilmembers Phan, Mendoza and open to interested councilmembers*
 2. *Housing Ad Hoc Committee – Councilmembers Phan, Lopez, Mayor Sarmiento*
 3. *School Collaboration Committee – Councilmembers Mendoza, Lopez, and Hernandez*
 4. *Homeless Ad Hoc Committee – Councilmembers Hernandez and Bacerra; and Mayor Pro Tem Penaloza*