

THE OFFICES OF
HASKINS & ASSOCIATES, APC

STEVEN W. HASKINS*
ELENA L. HASKINS

CYRUS E. SERADJ*
MARGARET PITCHKOLAN*
CRAIG SANDERS*

OF COUNSEL

STEVEN F. WINGFIELD

*ALSO A LICENSED REAL ESTATE BROKER

A PROFESSIONAL LAW CORPORATION

ATTORNEYS AT LAW

4045 BONITA ROAD, SUITE 206

BONITA, CALIFORNIA 91902-1336

TELEPHONE (619) 479-4351

FACSIMILE (619) 479-0337

WWW.HASKINSLAW.COM

LETICIA SORIANO, NP, AICBP, PARALEGAL
VICKI M. WALKER, PARALEGAL

RANCHO SANTA FE OFFICE
8108 LA FLECHA, SUITE 203
P.O. BOX 1907
RANCHO SANTA FE, CALIFORNIA 92067
TELEPHONE (800) 869-1667

SENDER'S E-MAIL ADDRESS:

SteveH@HaskinsLaw.com

March 18, 2008

BY HAND DELIVERY

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
1200 Third Ave., Ste. 1620
San Diego, CA 92101

RE: La Jollans for Clean Government, Inc./ LJCPDAB/ Brown Act Violations

Dear Mr. Calabrese:

As you know this firm represents *La Jollans for Clean Government, Inc.*, a watchdog group created by La Jolla residents to insure openness and legal compliance in local City sponsored boards and committees.

La Jollans for Clean Government, Inc. has found evidence of serious and chronic violations of the Brown Act by the La Jolla Community Parking District Advisory Board ("LJCPDAB" or "Parking Board"). These violations go to the heart of the Board's functioning. The legal failings are particularly disturbing because the Board's primary mission was to solicit and synthesize public opinion into a recommendation for presentation to the City Council. Instead, the Parking Board plotted and planned, often in secret, how to achieve a pre-selected result. These violations have culminated in three Board-generated parking plans – all calling for paid street parking. To cure this violation, it is necessary for: (1) the Board to set aside the illegally developed plans; (2) have an open and public debate on a preferred plan; and (3) then (in accordance with its established process) provide that untainted plan to the public for a 45-day comment period before taking final action on it. While it is impossible to undo past violations of law, the Parking Board can take corrective action before proceeding and compounding prior illegal violations. The public deserves corrective measures, and the law demands it.

If the Board proceeds without taking corrective measures, the only option may be to seek an injunction or other relief, prove the violations through documentary evidence and depositions, and let a court decide whether the Board Members violated the law and, if so, the remedy.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Two

I LEGAL BACKGROUND

The Parking Board fails to comprehend the trust under which they operate, as explained in the Brown Act:

“In enacting this chapter, the Legislature finds and declares that the 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 deliberations be conducted openly.**” Cal. Gov. Code §54950.

The nature of the violation is explained by the California Attorney General (84 Ops.Cal.Atty.Gen.30):

“The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken . . . to be monitored by the public but also the deliberations leading to the actions taken. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 375; *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 795-797; *Stockton Newspaper, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 100; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 45.) **“The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’** [Citation.]” (*Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234; see *Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 376.)”¹

As used in the Brown Act, collective decisionmaking includes deliberations:

“The collective decisionmaking process consists of both “actions” and “deliberations” which must respectively be taken and conducted “openly”

¹ “It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either.” *Frazer v Dixon Unified School District*, (1993) 18 Cal.App.4th 781, 22 Cal.Rptr.2d 641.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Three

(§ 54950). Thus the meeting concept can not be confined exclusively to either action or deliberation but rather comprehends both and either (*id.*, at p. 47). Since deliberation connotes not only collective discussion but also the “collective acquisition and exchange of facts preliminary to the ultimate decision,” the Brown Act is applicable to collective investigation and consideration short of official action. (*Id.*, at pp. 47-49; see also *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234, 175 Cal.Rptr. 292].) “In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.” (*Sacramento Newspaper Guild, supra*, 263 Cal.App.2d at p. 50; fn. omitted.)” *Stockton Newspapers, Inc. v. Redevelopment Agency of the City of Stockton* (1985) 171 Cal.App.3d 95, 214 Cal.Rptr. 561.²

The Board cannot escape its repeated violations by claiming it has only reached the penultimate step of preparing plans for a vote, but has not taken the final vote. Thus, the courts, hold that a violation occurs even if the private communications were:

“...for the avowed purpose of discussing items of general importance irrespective of whether the individual members of the legislative body intend or do not intend to take 'action' at such a gathering.” *Stockton Newspapers, Inc. v. Redevelopment Agency of the City of Stockton* (1985) 171 Cal.App.3d 95, 214 Cal.Rptr. 561. *Frazer v Dixon Unified School District*, (1993) 18 Cal.App.4th 781, 22 Cal.Rptr.2d 641.

² This holding is not isolated. It is now well settled that the term “meeting,” as used in the Brown Act (§§ 54950, 54953), is not limited to gatherings at which action is taken by the relevant legislative body; “deliberative gatherings” are included as well. (*Sacramento Newspaper Guild, supra*, 263 Cal.App.2d at p. 48.) Deliberation in this context connotes not only collective decisionmaking, but also “the collective acquisition and exchange of facts preliminary to the ultimate decision.” (*Id.*, at pp. 47-48; *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234 [175 Cal.Rptr. 292].)” *Frazer v Dixon Unified School District*, (1993), 18 Cal.App.4th 781, 22 Cal.Rptr.2d 641.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Four

Likewise, the violation occurs even if the members did not reach a “collective agreement or commitment”:

“Respondents also argue that some sort of “collective agreement or commitment” must occur at a deliberative gathering to bring it within the “meeting” concept. This cannot be, and is not, the law. (*Sacramento Newspaper Guild, supra*, 263 Cal.App.2d at p. 48 [“deliberative gatherings are 'meetings,' however confined to investigation and discussion”]; *Rowen, supra*, 121 Cal.App.3d at pp. 233-234 [gathering to discuss qualifications of prospective consultants was a Brown Act “meeting” notwithstanding the fact that no commitment was made about retaining them]; 42 Ops.Cal.Atty.Gen. 61 (1963) [Brown Act applies to “briefing sessions” by which employees of local agency simply provide information to a gathering of members of the legislative body].” *Frazer v Dixon Unified School District*, (1993) 18 Cal.App.4th 781, 22 Cal.Rptr.2d 641.

II THE BROWN ACT VIOLATIONS

The members of the Parking Board engaged in repeated violations of the Brown Act when developing parking plans, discussing parking issues and agreeing on strategies to address the public.

A Illegal Voting and Board Member Polls

Although there are many ways to violate the Brown Act, the most overt violations include email votes and email polls of board members. Sadly, the Parking Board proposed using these very illegal procedures. (Page number references are to Bates stamped numbers in the lower right hand corner of the enclosed exhibits- “BD” refers to the Parking Board):

04-17-06 Wagener email to the Board regarding Board Rules, calling for an email vote: “If all board members would be so kind to give me an email vote, we could include the results in our Minutes for the last meeting....**In order to vote all you need to do is reply to the email and state: I am in favor, or I am not in favor.**” Page 0384.

06-12-07 Consultant to the Board, Leslie Wade, circulates by email a draft of the FY 2007 Program and Budget for Parking District (subsequently presented to and approved by the City Council.) She writes to the Board: “**Please reply to all [by email] with any substantive changes or your vote of approval by 9.a.m. tomorrow.**” Then, in a subsequent email Wade announces the email vote. Pages 0644-45.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Five

10-19-07 McGee email to the Board regarding Questions and Answers for dissemination to public. "Please review it [Questions and Answers] and give me additions and changes. If there is disagreement, **I'll poll everyone....**" Page 0454.

B Non-Public Development of Parking Proposals (Including Fact-Findings, Investigation and Deliberation)

The Board engaged in an astounding number of unlawful and secretive violations of the Brown Act as it deliberated on and prepared parking proposals.

10-13-06 Metcalf email to Board applauding the thinking of paid-parking advocate, Dr. Donald Shoup. Metcalf announces to the Board that "**we have the ability to formulate a truly great plan...based on Dr. Shoup's [paid parking] philosophy**". He then addresses how to use PR consultant, Leslie Wade to assist in the process. Page 0629.

10-13-06 Evans email to Board, addressing need to gain public support and praising the "Board and **the consensus we seem to be developing**" on parking issues. Page 0628.

10-13-06 Email from King to Board thanking Metcalf and Evans for share their views on the merits of paid parking. Then, he announces the goal "**to bring a large number of La Jollans along the path we have taken,**" reflecting the collective position secretly adopted by the board on parking meters as of October, 2006. Page 0627.

01-31-07 By email, Board Member Evans circulates his draft of the parking plan to other members, in private communication. He explains that "**given the sensitivity of the document,**" he has "**deliberately limited the circulation of this message to Board members....and [PLJ] staff.**" After providing his commentary on the draft, Evans invites Board Members to "**send me your comments and suggestions by e-mail** (or marking up the draft)." Pages 0601, 0602.

02-13-07 As requested by in the prior email, the Board Members responded to Mr. Evans and privately provided comments on the draft plan. Evans acknowledges, that "**based on the comments I've received from you,**" he has identified twelve subjects which require further consideration. He privately conveys detailed thoughts (deliberative in nature) regarding these open issues. He adds that, "**once we have reached some degree of consensus on these questions, I will revise the plan accordingly.**" Pages 0593-95.

07-15-07 Email from Metcalf to Board regarding information gathered with respect to parking issue. Page 0640.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Six

07-23-07 The entire Parking Board receives an email from Evans with a new parking plan. Again, extensive analysis of the plan is privately conveyed to the Board Members (but not the public) through the email. His email also acknowledges that Board Member, "**Marty McGee circulated an e-mail containing a number of very thoughtful comments and suggestions.**" Then, Evans contrasts his views with those of McGee. Evans explains why he disagrees with certain views of Board Members Patrick Ryan and Ray Weiss regarding the use of consultants and the proper length for a pilot program. Pages 0499-501.

7-24-07 Marty McGee emails the entire Board providing commentary on the parking plan which Evans had circulated the prior day to the Board. His emailed comments are detailed, deliberative, and communicated privately. Pages 1034-36.

09-11-07 In an email to the entire Board, another revised plan is privately circulated with email commentary from Mark Evans. Pages 0474-76.

09-12-07 Evans circulating another revised plan to the entire Board. Pages 0473-4

09-17-07 Evans provides the Board with an annotated draft of a parking plan he authored which is "intended to explain the rationales behind the various provisions." He explains, that "**my goal was to lay out in greater detail my own reasons for supporting the proposal.**" Again, this constitutes a form of deliberation which should occur in public. Page 0471.

09-21-07 McGee email to entire Board addressing Ray Weiss's idea about providing for "opt-out" provisions in the plan. Page 0946.

09-21-07 Email from Ryan to entire Board acknowledging private oral discussions with other Board Members regarding parking issues. He then states that he has assembled a lot of material regarding parking meter options and proceeds to contrast the various options (pay and display; space/multi-bay; photo-violation meters), procurement options, and enforcement issues. 0945.

11-04-07 Email from Evans to entire Board arguing that the Board should revise its approach regarding paid parking. He then advises the board that he is **providing "advance notice of what I will likely propose at the next meeting."** He proceeds to "spell out his thoughts in writing," offering a detailed justification for "a significant shift in my previously expressed views." Pages 0834-836.

11-07-07 Email from Evans to Wagener, engaging in deliberations, and attempting to develop pre-meeting agreement regarding: (1) changes in parking plan; and (2) how to share changes with the whole board. Pages 0434, 0435.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Seven

11-09-07 Wagener email to the Parking Board sharing his own parking plan and offering a detailed explanation of it, without publicly sharing that analysis and argument. Pages 0430-33.

11-09-07 Wagener emails the Board about "enhancements, clarifications, and changes to the pilot program" he favors. He offers analysis to support his position. In the email he attaches a revised parking plan. Pages 0797-98.

C Non-Public Board Deliberations on How to Inform/Shape Community Opinion on Parking Issues

The Board spent considerable time in private email deliberations discussing how to convince the public to share its views on parking proposals and issues. The purpose was to ultimately gain support for the Board's favored parking plan, which centered on parking meters.

06-27-07 Email (McGee to BD) re draft parking Q&As for future public dissemination. He requests others to "send out your suggestions for modifications on what I said, and also include your own questions and answers to everyone." Page 0521

07-03-07 Email (McGee to BD) circulating draft parking Q&As for future public dissemination. McGee advises the Board to "not pass the" document "to anyone until it is no longer a DRAFT of my thoughts." Page 0518

07-04-07 Email (McGee to BD) circulating a revised Q&A to the board for comment. Page 0517-8

07-05-07 The Executive Director for Promote La Jolla, Tiffany Sherer, advises the entire board that a member of the community wrote an editorial opposing meters. She urges "members of the parking board...to write their own "Guest Editorial" in support of parking meters. Pages 1061-62.

07-05-07 Weiss responds to the of PLJ's Executive Director with an email to the entire Board suggesting the editorial can come out the following week. Pages 1060.

10-19-07 Email (McGee to BD) presenting his "version of Q&As that can be made available to the public to explain how we are thinking about many issues with parking. Please review it and give me additions and changes. If there is disagreement, I'll poll everyone...." Page 0454

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Eight

10-28-07 Email (McGee to BD) discussing the Q&A. He states that "I will put the name it [The Q&A] rather than having it come from the group, just as Mark put his name on the plan and pilot program." Page 0870.

10-28-07 Email (Evans to Mosier, et al.) Evans comments "1. I'm troubled by the tenor of the draft, which seems to me to be more an advocacy piece than an educational tool. I believe that anything we put forward that looks like advocacy will be subject to attack and will gain us no converts." And "2. During the comment period, and until we actually approve a final proposal, the Board must remain, both in fact and in appearance, entirely open-minded. We cannot, consistent with that posture of open-mindedness, publish a set of Q&A's that presuppose the answers to the many questions currently on the table." The BD then had McGee claim the Q&A as his own, so that they could be out in the public domain (see preceding entry). This is key in illustrating how certain members of the BD functioned and shaped what was presented to the public as individual creations when they were in fact collective behind-the-scenes efforts in violation of the Brown Act. Pages 0870-0871

11-01-07 Email (McGee to BD) with revised Q&A. Page 0442

11-02-07 Email (King to BD) with proposed revisions to Q&A. Page 0439

11-02-07 Email (King to BD) re proposed change to Q&A. Page 0438

D Brown Act Violations in the Development of Board Rules

04-16-06 Email (Weiss to BD) distributing revised text for Standing Order No. 5, asking Board, by email, to "please reply- to-all with your approval (or with your disapproval and/or further comments." Page 1564.

04-16-06 Email (Evans to BD) responding to Weiss with proposed language modifications he wants to address "before I cast my vote" by email. Pages 1561-62.

04-17-06 Email (Weiss to BD) stating that he might be willing to adopt language changes to bylaws suggested by Evans but he is "content to see what other have to say" as part of the Board's email discussion. Page 1557.

04-17-06 Email (Evans to BD) sending another email at Wagener's urging re language changes to bylaws. Pages 1557-78.

Hon. Michael Aguirre
City Attorney, City of San Diego
ATT: Michael Calabrese, Esq.
March 18, 2008
Page Nine

04-17-06 Email (Wagener to BD) referring to a version of "Standing Rule #5 that Mark has sent to you. Ray indicated that he could live with the wording," with certain language changes, which Wagener sets forth in his email. He then asks for "all board members...to give me an email vote...."
Page 1553.

04-17-06 Email (Weiss to BD) proposing changes in Revised Standing Order No. 5 pertaining to voting requirements. Page 0383

04-17-06 Email (Evans to BD) announcing support for changes that Weiss has proposed in email re Standing Order No. 5. Pages 0382-3

04-17-06 Email (Metcalf to BD) explaining his rationale for supporting the bylaw change, and stating "I therefore vote in favor of the language below." Pages 1550-51.

04-17-06 Email (Evans to BD) issuing still another proposed change to the language of the bylaws which he declares to be "a kind of hybrid version that draws on Ray's idea of absentee voting by email." Pages 1548-49.

04-19-06 Email (Wagener to BD) objecting to proposed use of email absentee voting. Pages 1539-40.

04-22-06 Email (King to BD) addressing draft standing order. Pages 1514-15.

E Board Members' Knowledge That They Were Violating the Brown Act

08-08-07 Evans objects to meeting at the PLJ office as a potential violation of the Brown Act.
Page 1007

08-11-07 Evans writes about how to have further meetings and not getting into Brown Act trouble. Page 1000

08-12-07 McGee's frustration at having potential future private meetings with merchants shut down. Page 1009

III CONCLUSION

If the government acts in secret it cannot be trusted or publically guided. In this instance, the Board engaged in private deliberations, fact-finding, and document drafting prior to public meetings. In

