

THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: October 7, 2014

TO: Honorable Council President and City Councilmembers

FROM: City Attorney

SUBJECT: Non-Agenda Public Comment at City Council Meetings

INTRODUCTION

In September 2001, at the suggestion of former Councilmember Ralph Inzunza (see the attached memorandum dated July 24, 2001) (2001 memorandum), the San Diego City Council (Council) amended the Permanent Rules of the Council (Rules) to provide, among other things, that Monday and Tuesday Council meetings be deemed one consolidated meeting and that public comments be docketed only for Tuesdays. Former City Attorney Casey Gwinn advised the Council at the time it “could provide for a single ‘public comment’ . . . on either Monday or Tuesday and satisfy the Brown Act” because the Council’s agenda is consolidated. *See City Att’y MS 2001 at 2-3 (July 25, 2001)*, attached to this memorandum.

The Rules were amended to state that the “regular weekly meeting of the City Council required by Chatter section 13 shall be scheduled over a two-day period” and that [a] single consolidated agenda covering the regular Council meeting each week shall be published.” San Diego Ordinance O-18983 (Sept. 24, 2001) (Ordinance O-18983).

However, a review of sample agendas online during the past thirteen years following adoption of Ordinance O-18983 indicates that the online practice was not to publish a “single consolidated agenda” covering a two-day meeting, but to continue publishing separate agendas for separate regularly scheduled meetings on Mondays and Tuesdays. Public comments have only been permitted on Tuesdays.

¹ The Permanent Rules and the San Diego Charter (Charter) have been amended several times since 2001. As related to this issue, please see Charter sections 14 and 270; San Diego Municipal Code (Municipal Code), Chapter 2, Article 2, Division 1, Rules 1 and 2.

An issue has been raised as to whether the Council must provide for public comments on Mondays and Tuesdays.

QUESTIONS PRESENTED

1. When publishing two separate agendas for separate regular meetings on Mondays and Tuesdays, must the Council provide for public comments at each meeting?
2. If the City were to publish a consolidated agenda covering a two-day meeting on Mondays and Tuesdays, may public comments be scheduled only on Tuesdays?

SHORT ANSWERS

1. Yes, under the letter of the law.
2. Maybe. That depends upon whether the Council's Rule is upheld as a proper exercise of discretion.

ANALYSIS

I. WHEN PUBLISHING TWO SEPARATE AGENDAS FOR SEPARATE REGULAR MEETINGS ON MONDAYS AND TUESDAYS, THE COUNCIL MUST PROVIDE FOR PUBLIC COMMENTS AT EACH MEETING

The Ralph M. Brown Act (Brown Act) governs open meetings for local government bodies. Cal. Gov't Code §§ 54950-54963. It is intended to facilitate, among other things, public participation in local government decisions. *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 555 (1994). "Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules." California League of Cities, *Open and Public IV: A Guide to the Ralph M. Brown Act* at 3 (2nd ed., Revised July 2010).

California Government Code (Government Code) section 54954.3(a) provides, in pertinent part, as follows: "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public"

Clearly, the Council's intent since 2001 has been to view Monday and Tuesday meetings as one consolidated meeting with public comments provided for on Tuesday. That intent is reflected in the Council's Rules, which describe a ten-hour session: three and one-half hours on Mondays and six and one-half hours on Tuesdays, excluding breaks.

Notwithstanding the desire in 2001 to begin consolidating Monday and Tuesday meetings into one meeting with one agenda, the practice of publishing separate agendas online for separate Monday and Tuesday regular meetings continued.

The Brown Act requires that public comment be provided for in every agenda for regular meetings. When the City publishes a separate agenda for a regular meeting on Monday and a separate agenda for a regular meeting on Tuesday, public comments must be permitted at each meeting.

II. PUBLISHING A CONSOLIDATED AGENDA FOR A TWO-DAY MEETING MAY ALLOW FOR PUBLIC COMMENT ON ONE OF THE DAYS AS LONG AS THE COUNCIL'S EXERCISE OF DISCRETION IS UPHELD

The Brown Act states that “every agenda for regular meetings” must include an opportunity for public comment. If there is a consolidated agenda for a two-day meeting, the agenda may allow for public comment on one of the days, provided that the legislative body has not abused its discretion in scheduling pre-planned two-day consolidated meetings. That determination would be up to the court.

A. Single General Public Comment Period Where a Public Body Meets in Multiple Sessions May Comply With the Brown Act

In *Chaffee v. San Francisco Library Commission*, 115 Cal. App. 4th 461, 468 (2004), the court held that one public comment opportunity complies with the Brown Act where a meeting is continued to a second day after loss of a quorum.

In *Chaffee*, the Library Commission lost a quorum and had to continue its meeting to a second day in order to complete the unfinished portion of its agenda. Included in the unfinished portion of the agenda was public comment, which was held on the second day. Plaintiff sued, alleging that the Brown Act required public comment at each session of the body's meetings.

The court disagreed, upholding the plain meaning of the Brown Act. The court reasoned that the Legislature's use of the word “agenda” would be rendered “mere surplusage” if the court were to determine that general public comment must be allowed at every session or “meeting” of a public body. *Id.* at 468. “[T]o require a single general public comment period where a public body meets in multiple sessions to consider its agenda is fully consonant with the plain meaning of the applicable open government statutes and avoids absurd results.” *Id.*

Chaffee involved an unplanned multi-day meeting, not a regularly scheduled multi-day meeting. That raises the issue as to whether a city council may schedule by rule multi-day regular meetings in order to limit public comment to one day.

B. Generally, a Legislative Body Has Wide Discretion to Determine Its Own Rules and Procedures

The Brown Act recognizes that legislative bodies have wide discretion to determine its own rules and procedures. This could include the discretion to schedule one meeting over multiple days.

As explained in Government Code section 54954:

Each legislative body of a local agency, except for advisory committees or standing committees, shall provide, by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body, the time and place for holding regular meetings.

This is also stated in Government Code section 36813, which provides that “[t]he council may establish rules for the conduct of its proceedings.” *See also Nevens v. City of Chino* 233 Cal. App. 2d 775, 778 (1965). The Council has met this requirement by codifying its procedures in Chapter 2, Article 2, Division 1 of the Municipal Code.

C. A Legislative Body May Not Adopt Rules or Procedures that Constitute an Abuse of Discretion or Violate the Brown Act

Although a legislative body has wide discretion to determine its own rules and procedures, a court will step in where there is “an abuse of discretion.” 75 Op. Cal. Att’y Gen. 89 (1992).

Government Code section 54954.3(b) provides that the legislative body “may adopt reasonable regulations to ensure that the intent of subdivision (a) [regarding public comment] is carried out” This provision will be broadly construed in favor of greater public access. California League of Cities, *Open and Public IV: A Guide to the Ralph M. Brown Act* at 3.

The idea of consolidating Monday and Tuesday meetings was raised in 2001 by former Councilmember Inzunza. Councilmember Inzunza’s 2001 memorandum explains the reason for his proposal to limit public comments to one day:

While I strongly support a citizen’s right of freedom of expression, I am concerned that many citizens who do not regularly attend the Council meetings have to wait, sometimes for hours, to address the Council on items that have been docketed and noticed for a particular day. This is due primarily to a small group of public speakers who attend Council meetings on a regular basis and speak on topics that are not on the agenda of the Council for a given day. Many times the speakers speak day after day on the same topic and seek no specific action from the Council on any of the items they are speaking about.

In his 2001 opinion, former City Attorney Gwinn concluded that the “duplicative comment on both Monday and Tuesday,” may be limited to one day. City Att’y MS 2001 at 3. No mention was made regarding discretion or Government Code section 54954.3(b)’s reference to “reasonable regulations to ensure the intent of subdivision (a) [regarding public comment] is carried out.”

Although the *Chaffee* case is authority for the proposition that an unplanned two-day meeting necessitated by losing a quorum need only have public comment on one day, it does not stand for the proposition that a legislative body may schedule two-day meetings every week in order to limit public comment to one day. There is no case on whether that would constitute an abuse of discretion.

On the one hand, it can be argued that the Council has the right to reasonably control its agenda and is not restricting content or volume of speakers under public comment. It is only designating a time at which the public comments may be made. Although it would be unreasonable to view an entire month of meetings as one “agenda,” that is not the case here. A two day consolidated meeting is no more than organizing the agenda and, as described by former Councilmember Inzunza, protects other speakers who spend hours waiting to be heard on their matters. There is compliance with the Brown Act, the argument would go, with the Council simply exercising control over timing which it is entitled to do.

On the other hand, it can be argued that the Council is charged under Government Code section 54954.3 with ensuring “the intent” of the Brown Act’s provision for public comment “is carried out.” This provision must be “broadly construed” in favor of greater public access. Creating a two-day consolidated meeting in order to limit access, the argument would go, does not carry out a law that is intended to facilitate access. What’s more, the argument would continue, if the Council wants to protect other speakers, it could schedule public comments at the end of the agenda.

Both sides on this issue would have viable arguments. This would be a relatively simple “test” case that might have statewide impacts. Although the County of San Diego and City of Los Angeles have multiple-day meetings, they provide for public comment on each day. Other cities,² however, may have processes similar to the City of San Diego.

CONCLUSION

This Office stands ready to assist the Council and City Clerk with any changes to its current practices, and to the Rules, that the Council desires.

JAN I. GOLDSMITH

By /s/ Jan I. Goldsmith
Jan I. Goldsmith
City Attorney

JIG:ccm

cc: Andrea Tevlin, Independent Budget Analyst

Attachments (2)

ML-2014-11

Doc. No. 876981

² Based on a limited review, we did not find a city with processes similar to the City of San Diego.

JUL 25 2001

COUNCILMEMBER RALPH INZUNZA

City of San Diego
Eighth District

MEMORANDUM

DATE: July 24, 2001
TO: Mayor and Councilmembers
FROM: Councilmember Ralph Inzunza *mc. jrd*
RE: Public Qominent on Non-Agenda Items

I would like to propose an amendment to the Council rules consistent with the Ralph M. Brown Act that would provide one opportunity for non-agenda public comment each week that the Council meets. Government Code section 54954.3 provides that "every agenda" for regular meetings shall provide "an opportunity" for members of the public to directly address the legislative body on any item of public interest that is "within the subject matter jurisdiction of the legislative body." This section has historically provided for non-agenda public comment at each meeting of the San Diego City Council.

While I strongly support a citizen's right of freedom of expression, I am concerned that many citizens who do not regularly attend the Council meetings have to wait, sometimes for hours, to address the Council on items that have been docketed and noticed for a particular day. This is due primarily to a small group of public speakers who attend Council meetings on a regular basis and speak on topics that are not on the agenda of the Council for a given day. Many times the speakers speak day after day on the same topic and see no specific action from the Council on any of the items they are speaking about.

Most California cities have non-agenda public comment at the end of their meetings rather than at the beginning. This system honors the priority of those citizens who are at meetings for noticed, docketed items on that particular day. I would ask that the Rules Committee consider this option at the present time.

It is my recommendation that the Council rules be amended to clarify, consistent with the practices of most California cities, that the Monday and Tuesday agenda is one "agenda" pursuant to the Brown Act. This will then focus all non-agenda public coinment on one day rather than two days. It will allow all those wishing to speak the opportunity to speak while consolidating public comment into one day. I would ftniher recommend that, for now, we schedule the public comment at 10 AM on Tuesdays, but allow the Mayor the discretion to take the testimony at any time during the meeting if there are pressing or time certain items that may need to be heard first.

0-18983

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
236-6220**

DATE: July 25,2001
TO: Rules Committee
FROM: City Attorney
SUBJECT: City Council Permanent Rules

INTRODUCTION

We understand that the agenda for the Rules Committee meeting of July 25, 2001, contains a discussion of Rules 1 (d) and 3 of the Petmanent Rules of the City Council [Rules]. The Rules Committee Consultant has requested a brief background memorandum regarding the Rules to assist in the discussion.

DISCUSSION

A. The Permanent Rules

San Diego City Charter section 13¹ provides that the City Council shall have at least one regular meeting each week, but leaves the specifics as to the time and place of such meetings to the City Council in procedures adopted by ordinance. In addition, Charter section 14 requires

¹Charter section 13 provides, in relevant part:

The Council shall provide by ordinance for the time and place of holding its meetings; provided, however, that there shall be at least one regular meeting in each week.

. . . The first meeting of the Council shall be held at ten o'clock A.M. on the first Monday after the first day in December following its election.

All subsequent meetings shall be held pursuant to adjournment, or in accordance with a rule adopted by the Council which may be amended at any time.

the City Council to “determine its own rules and order of business.” The City Council has implemented the provisions of the Charter in this regard by adopting the Rules.

Generally, the Rules provide guidelines for the conduct of City Council meetings and related procedures. Rule 32 provides that the Council may temporarily suspend any Rule provided that it applies only to the matter under consideration; does not extend beyond adjournment; and 2/3 of the Council members vote in favor of suspension.

The Rules were adopted, and have been amended from time to time, by ordinance (most recently on October 16, 2000, by Ordinance No. O-18862). The Rules are codified at Municipal Code section 22.0201.

B. Rule 1 (d)

Rule 1 (d) provides for one night meeting per quarter at various community facilities throughout the City. This Rule could be amended to provide more discretion in the calendaring of such meetings, either by the City Council as a whole, or with the Mayor.

C. Rule 3

Rule 3 addresses the “Procedure for Council Meetings.” It provides generally for the order of business for Council meetings. In particular, the Rule provides for “Public Comment” on both Monday and Tuesday of each week.

There has been some recent discussion, about the “public comment” requirement of the California open meeting law, the Brown Act (Government Code sections 54950-54962), and its relationship to Rule 3. The Brown Act sets forth the basic requirement regarding the ability of the public to speak to the Council. In relevant part, Government Code section 54953.3 provides: (a) Every *agenda* for regular meetings shall provide an opportunity for members of the public to directly address the legislative body” (Emphasis added.) The requirement basically provides that the public must be allowed (with limited exceptions) to address the City Council on an item of business before it on a given agenda, or on matters within the jurisdiction of the City Council.

Rules 8 and 9 embody this requirement in the Rules. Rule 9 sets forth procedures for debate and comment on matters under consideration on the agenda. Rule 8 adopts almost verbatim the Brown Act requirement regarding comment on matters not on the agenda. The “non-agenda” comment rule is related to Rule 1 (b), which provides for a “single docket” for the regular meetings each week. Because the City Council has a consolidated agenda, in our opinion, the City Council could provide for a single “public comment” period in the Rules on either Monday or Tuesday, and satisfy the Brown Act and Rule 8. In addition, because the

Rules Committee
July 25, 2001
Page 3

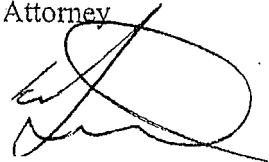
Rules provide for the ability of members of the public to comment on matters as they are under consideration, current public comment need not allow comment during the Monday meeting on a matter on the City Council docket for consideration on Tuesday. We point out, however, that the chair has the discretion to allow such comment under exceptional circumstances, for example where a member of the public cannot appear on Tuesday, but wishes to comment on Monday. What may be limited is duplicative comment on both Monday and Tuesday. It may be advisable, however, to amend the Rules to make clear the public comment limitations.

CONCLUSION

The Rules set forth the procedures to be followed by the City Council regarding the conduct of its proceedings. In most cases the Rules are mandatory, but some discretion is left to the Council and the chair.

We hope this memorandum is helpful.

CASEY GWINN, City Attorney



By:

Leslie J. Girard
Assistant City Attorney

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