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By Hand

August 29, 2003

Susan Chasworth, Esq.
Assistant Head Deputy District Attorney
Los Angeles County District Attorney's Office
766 Hall of Records
320 West Temple Street
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Re: Allegations of Brown Act Violations by Leaders of the City of La Habra Heights

Dear Ms. Chasworth:

Introduction. As promised, I write on behalf of my client, the City of La Habra Heights, to reply to your July 24, 2003 letter, which concludes that the City violated the Brown Act in a number of respects.

The City views your letter, and the political strife in the community to which you have become an unwitting aid, with profound dismay. The City is deeply disappointed that your office would publish such a letter without having discussed with the City the facts and allegations which underlie your conclusions. Although it appears you allowed the City's critics ample opportunity to state their views, you did not afford the City the same courtesy. Indeed, the City had no input whatsoever; its first notice of your review of this matter was my receipt of your letter. That process not only raises questions of fundamental fairness, it disserves your own goal of promoting Brown Act compliance. The facts as stated in your letter are, in many cases, simply wrong; and, in others, meaningfully incomplete. Your analysis of two aspects of the Brown Act crucial to your conclusion is, in my professional opinion (and, I believe, in the opinion of a majority of reputable public lawyers), highly debatable. At the very least, you should have acknowledged that yours is not the only reasonable interpretation of a statute you acknowledge to be less than clear.

The City shares your office's commitment to both the letter and the spirit of the Brown Act. The active participation of the members of this small, and occasionally fractious, community is a core value of all who have led the City, both past and present, in the ten years I

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have served it. Accordingly, the City welcomes this opportunity to restate that commitment and hopes that these unfortunate circumstances may lead to enhanced understanding of the value the City places on public input.

Request for Correction. Accordingly, the City respectfully requests that you (i) withdraw your letter of July 24th, (ii) allow a fair opportunity for input by the City as well as by its critics with respect to any further conclusions your office makes public in this matter, (iii) acknowledge that your interpretation of two key aspects of the Brown Act, as discussed below, is fairly debatable, and (iv) correct the factual errors in your discussion. To do otherwise is to do a grave disservice to the City's Councilmembers, Commissioners and other volunteer participants in La Habra Heights' local government and to allow your office to be a tool of political strife in this community. In reviewing the allegations against the City in light of the facts and policy commitments noted here, you may be able to conclude that maintenance of these policies is sufficient to resolve your office's concerns. If not, the City would be pleased to discuss with you what further revisions to its policies and practices would do so.

I turn now to your specific allegations.

1. *Serial meetings.* The City, of course, acknowledges the requirement of Section 54952.2 of the Brown Act, which provides:

“any use of direct communication, personal intermediaries, or technological devices *that is employed by a majority of the members of the legislative body to develop a collective concurrence* as to action to be taken on an item by the members of the legislative body is prohibited.” (Emphasis added.)

You read this section as amounting to a rule that prohibits “emails sent by a member of a legislative body to a majority relaying substantive information, opinions, suggestions, advice, etc. regarding a topic within the body's subject matter jurisdiction.” With respect, I disagree. The Attorney General's opinion that you give as the sole authority for your conclusion is to the contrary. The Attorney General writes:

“The statutory prohibition applies to such use [of technological devices such as email] ‘by a majority of the members of the legislative body.’ *Anything less than a majority is not covered by the statute.* (See *Roberts v. City of Palmdale*, supra, 5 Cal.4th at 375-77; *Frazer v. Dixon Unified School Dist.*, supra, 18 Cal.App.4th at p. 797.) Here, we are given that a majority of the board members *are sending e-mails to each other.*” California Attorney General's Opinion No. 00-906 (Feb. 20, 2001) (emphasis added).

The crucial factor is participation by a *majority* of a Brown Act body. Where less than a majority state their views, it is not possible for a “collective concurrence” to have been formed – much less for a majority to have “used” email or another device to form such a concurrence.

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Passive receipt of memorandum – such as legal memos, staff reports, and letters from the public – does not amount to the “use” of an intermediary to develop a concurrence. The rule you offer would require Councilmembers to enter public meetings a blank slate, to read their mail aloud, and to receive all their legal advice orally and in public. Such is not the law.

The facts of the California Supreme Court’s decision in *Roberts v. Palmdale*, on which the Attorney General’s opinion you cite relies, illustrate the point of law underlying his opinion. In that case, Palmdale’s contract city attorney sent a memo to the Palmdale Planning Commission providing detailed legal advice regarding a contested land use matter. The attorney for the landowner involved in the matter demanded a copy of this attorney-client privileged advice and, when refused, alleged that the very existence of the memo was a serial meeting violation of the Brown Act of the very sort you and La Habra Heights’ critics now allege. The Supreme Court ruled unanimously in an opinion by the late Justice Mosk (himself a former Attorney General) that a public lawyer is entitled to give privileged, written advice to his client, even when that advice pertains to a matter to be discussed at an open and public meeting, and notwithstanding the poorly drafted provision of the Act that you cite to the contrary. You acknowledge, as you must, that this Supreme Court decision is good law.

Moreover, the Brown Act itself suggests that written information can be provided to a majority of a legislative body in advance of a meeting without violating the Act. Section 54957.5 states:

“agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act.”

It would make no sense for the Brown Act to require such materials to be made public if their very existence were evidence of a serial meeting violation.

The City acknowledges, of course, as both a Planning Commissioner and I noted in the email correspondence that you have reviewed, that emails addressed to all members of a Council or Commission create a risk of a serial meeting violation if more than one or two members of such a body reply to the message, creating, in effect, a give and take among a majority of the legislative body. The fact that the email traffic you reviewed reflects these warnings demonstrates that the City (i) understands its obligations to avoid serial meeting violations; (ii) makes a meaningful effort to do so, and (iii) intends to comply with the law. If you need more evidence of this, I would be happy to provide videotapes of my regular and public trainings and orientations on the Brown Act and other laws applicable to La Habra Heights’ officials. Further, it is the City’s practice, which the City would have happily pointed out to you, had it been given the opportunity, to implement Section 54957.5 of the Act by copying the City Clerk

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on non-privileged¹ materials that it has notice have been provided to a majority of the Council or Commission. The City Clerk then makes these materials available for public inspection.

The City agrees to maintain these practices: (i) to avoid participation by a majority of any Brown Act body in email or any other communication that constitutes a serial meeting in violation of the Brown Act, (ii) to make public copies of any material the City has notice has been provided to a majority of a Brown Act body with respect to a matter subject to discussion at a public meeting of that body, and (iii) to promptly cure any inadvertent violation of these rules that might occur or be credibly alleged. If you believe that the Brown Act requires more of the City than this, I would be happy to review the authorities on which you rely and to work with your office to ensure that both the letter and the spirit of the open meeting law are observed. However, absent a legal duty to do so, the City will not surrender the meaningful use of email and other information technologies that allow it to serve its residents with increased efficiency, reduced cost, and increased accessibility.

2. *The General Plan Questionnaire.* City staff did prepare a questionnaire by which members of the Planning Commission could identify which of the literally hundreds of proposed General Plan policies bore discussion. Members of the General Plan Advisory Committee (GPAC), Commission, Council, and public alike have observed repeatedly that the bulk of the General Plan is uncontroversial and does not require discussion. Staff believed that use of a questionnaire to assist them in formulating agendas and staff reports, and in focusing discussion, would be efficient. As you have pointed out, such a questionnaire created the opportunity for a majority of the Commission to tentatively decide the utility of certain policies without discussing them. The City does not concede that this occurred (or that the questionnaire results were communicated to a majority of the Commission before they were publicly released as part of a voluntary Brown Act cure). However, the City does view the creation of the questionnaire as unnecessarily risky and will not use this device again.

However, your letter should also have noted that the City voluntarily cured this alleged violation of the Brown Act when a resident objected to it. The City did so by making the questionnaire and all responses to it public and scheduling a specific meeting of the Planning Commission before the Commission made its recommendation at which any matter pertinent to the questionnaire and any policy the Commission had not specifically addressed might be raised

¹ I should note that the City does not waive the attorney-client privilege or the attorney-work-product doctrine as to my oral and written, non-public advice to its leaders. The City does not know how you came into possession of my emails to the Commission and Council regarding the General Plan, but such disclosure was certainly not authorized by the City Council, the holder of the privilege. Accordingly, we request their immediate return. Further, you may wish to review this matter to ensure compliance with your own ethical obligations when you are the inadvertent or unauthorized recipient of privileged materials. See, e.g., *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644; B. Witkin, 1 California Procedure § 602A (when a lawyer receives attorney-client privileged materials without authorization, recipient should refrain from examining the materials and immediately notify the sender of the error).

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for further public discussion. Perhaps you were simply unaware that the City provided this cure. Had you allowed the City input into your fact-gathering, the City would have informed you of it.

As you know, there are three broad classes of remedies under the Brown Act: an action can be invalidated if taken in violation of the Brown Act and without a cure, after a demand for cure is made; a judge can issue an injunction or other order to prevent further violations of the Act, if violations are proven, and there is a risk they will be repeated; and, criminal remedies, which are available only in very narrow circumstances. Government Code Section 54959 states:

“Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and *where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter*, is guilty of a misdemeanor.” (Emphasis added.)

This is an exacting standard and Brown Act prosecutions are rare. To my knowledge, your office has never brought such a charge. In any event, you concede both in your letter and in our phone conversation of July 27th that there is no evidence that the City sought to deprive the public of information to which it was entitled. Indeed, given the cure provided above and the City’s efforts to televise its meetings, to make written materials distributed available via the City Clerk, and to preserve tapes of its meetings, the opposite is plainly the case. Nor have you pointed to any action taken in an illegal meeting, whether serial or otherwise. Indeed, the complete absence of any suggestion that a crime has been committed here makes your glancing references to the criminal provisions of the Act especially troubling. We hope you will correct this in a revised letter on this subject.

There is a reason the Brown Act favors civil remedies over criminal remedies and requires that a person seeking to make an issue of an alleged Brown Act violation first demand a cure. The goal of the Brown Act is not punishment or the discouragement of civic volunteers such as those who serve on La Habra Heights’ uncompensated boards and commissions. The goal is meaningful public participation in a democracy. Where there is an alleged failure to foster that participation, the remedy is more public information, and more opportunity for public input. The remedy is not to chill the activity of those who devote their volunteer efforts to improving their communities. Your letter, unfortunately, has had precisely that chilling effect.

The City is happy to cooperate with your office and its residents to ensure continued compliance with the Brown Act. Thus, I am sure you will agree that judicial intervention will not be required, even if the facts were as you believed them to be. However, if you believe other or further cure of these alleged violation is either required or would be helpful, the City would appreciate your advice. The City respectfully requests, however, that you acknowledge that the City voluntarily provided a cure prior to any involvement by your office and as soon as the City’s compliance with the Act was questioned, and that further opportunities for input into the

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City's General Plan update remain. To do otherwise is to misrepresent the facts and to choose sides in a local, political dispute.

3. *The General Plan Advisory Committee is a Brown Act Body.* The City agrees that the GPAC (which has completed its work and disbanded) was a Brown Act body. If you should like to review them, I can provide the videotape of the televised orientation meeting of the GPAC at which I so advised the Committee, as well as copies of the posted agendas for the meetings of the committee. The allegations provided to you to that the GPAC did not comply with the Brown Act are simply wrong. Your reliance upon those baseless allegations is regrettable.

4. *Public Comment Procedures.* Wrong, too, are your conclusions regarding the Planning Commission's provisions for public comments and the handling of its minutes.

I must first refute your suggestion that City officials falsified Planning Commission minutes. Your apparently cursory review of the videotapes of a legislative body with which you are unfamiliar, together with the one-sided information provided by the City's critics and your decision to allow the City no input, apparently caused this confusion and allowed this highly inflammatory statement.

City Staff reviewed the videotapes and the minutes of the October 29, 2002 and January 7, 2003 meetings of the Planning Commission and they report as follows: The October 29th meeting featured public comment from 4 members of the public under "Items from the Public Not on the Agenda" at the outset of the meeting. The Commission then reviewed three Noise Element policies, and then took public comment on these items. The Commission then returned to these Noise Element policies and further discussed them in light of that public comment. The Commission then turned to the Safety Element policies, discussing many of them. The Commission then accepted public comment on these policies. Commission discussion then turned to scheduling matters, noting that further hearings were set for November 7, 11, 19, and 21, 2002 at which further input on these items could be provided.

At the January 7, 2003 meeting the Commission heard from nine members of the public under "Items from the Public Not on the Agenda" at the outset of the meeting. One of these, a member of the GPAC, asked the Commission to revisit its discussion from earlier meetings of Land Use Policy number 5 regarding ridgeline protection, providing but one of many examples of the fact that all participants in this lengthy (and ongoing) public dialog feel free to revisit issues frequently. The Commission then reviewed a number of land use policies. It took public comment on these policies and then discussed them further in light of these public comments. The Commissioners made express reference to comments made by members of the public. At the close of the meeting, staff announced that the next Commission meeting regarding the General Plan would be January 21, 2003 and the Commission did not act on its recommendation

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to the City Council regarding the General Plan until March of this year – some two months later, with many further opportunities for public comment in the interim.

It is true that the Commission delayed in adopting certain minutes. A Commissioner requested a delay so he could review certain areas of controversy. The Assistant City Attorney requested certain minutes be tabled for this same reason. No member of the Commission or the public ever informed the City of any concern that these minutes misstated the order of public comment in reference to Commission deliberations. Your July 24th letter is the first notice the City had of any such claim. In any event, it should be noted that the City tapes all meetings of the Commission and Council, that these tapes are repeatedly broadcast on cable television, and that tapes are maintained indefinitely.² Indeed, it was this practice that made it possible for you to review two of the more than 50 meetings on the General Plan held to date. To suggest that the City delayed approval of minutes to limit scrutiny of its practices regarding public input is simply not tenable. First, it remains my view (and had been my consistent advice to the City) that its practices regarding public comment comply with the Brown Act. Thus, there was nothing to conceal. Second, why would the City repeatedly broadcast, and preserve complete videotapes of, meetings it wished to conceal? Your characterization of the City's conduct is mistaken and the City respectfully requests you revise it.

Now, to the legal issue. We are in agreement that the relevant provision of the Brown Act is Section 54954.3(a), which provides:

“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, *before or during the legislative body's consideration of the item.*”
(Emphasis added.)

On each of the two nights you question, the Planning Commission took public comment after its initial discussions, but before its final discussions of each batch of policies. It plainly reacted to the public comment it received (as you conceded in our telephone conversation). This is obviously an opportunity for public comment “*during* the legislative body's consideration of the item.” Your reading of the statute limits the phrase “before or during” to mean only “before.” It is therefore quite plainly incorrect. The letter and spirit of the Brown Act were observed both evenings.

However, to avoid further dispute on this issue, the City agrees to maintain what has been the consistent practice of the City Council and the practice of the Planning Commission with the exception of a few of the meetings on the General Plan: it will allow opportunity for public comment on items on the agenda before those items are discussed by the members of the Commission or Council.

² I am informed that the City has never destroyed a meeting tape in all the years its meetings have been taped and broadcast. Should you wish to review any of these tapes, the City will gladly provide them to you.

Summary of City Policies. To summarize, the City will:

- Continue to avoid email exchanges in which three or more Commissioners or Councilmembers express their views.
- Continue to make public copies of all non-privileged writings, whether transmitted via email, U.S. Mail, or otherwise, that it has notice have been provided to a majority of its Commission or Council regarding an item which might be or become business of the body to which it is transmitted.
- Maintain its practice to promptly cure, upon request, any violation of the Brown Act that may be credibly claimed.
- Maintain its practice forbidding the use of questionnaires to summarize the views of members of Brown Act bodies on matters of public business.
- Continue to treat advisory committees such as the GPAC, other than those excluded from the Act by Section 54952(b), as subject to the Brown Act.
- Maintain the Council's practice, and regularize the Commission's practice, of allowing some opportunity for public comment on on-agenda matters at the outset of each meeting.

If you have questions or concerns about these policies, or other suggestions for how the City may fulfill its obligations under the Act, we would be pleased to discuss those with you. If not, we are hopeful that the City's affirmation of these policies and practices and your own review of the facts provided here may be the basis for a conclusion that your concerns regarding these matters have been responsibly addressed.

City requests. To recapitulate, the City respectfully requests that your office:

- Withdraw your July 24th letter.
- Allow the City meaningful opportunity to provide input into any further letter you may write regarding the City's Brown Act compliance to avoid any further errors of fact or unqualified statements of fairly disputable points of law.
- Acknowledge that your interpretation of two key aspects of the Brown Act, as discussed above, is fairly debatable.
- Correct the factual errors in your letter.

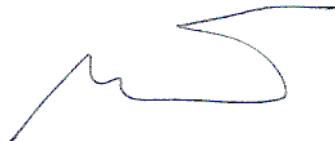
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- Acknowledge that City voluntarily provided a cure prior to any involvement by your office and as soon as the City's compliance with the Act was questioned, and that further opportunities for input into the City's General Plan update remain.
- Inform the City of any further cure that you believe is warranted.
- Assist the City in determining the course of conduct required to resolve any remaining concerns your office may have.

Conclusion. Again, the City and its leaders are committed to the letter and spirit of California's open meeting laws. The City's meetings are not scheduled by the dozen and do not commonly run until midnight because its officials are unconcerned with the views of its residents – those who voted for its current leadership and those who did not. The City regrets that your office has allowed itself to be drawn into a local political dispute and has issued a letter that contains significant factual errors and reaches conclusions of law which differ from those maintained by the great majority of public lawyers in California. The City appreciates the opportunity to restate its commitment to these principles and is hopeful that this controversy will allow greater understanding of the requirements of the law and of the values of the City.

I look forward to your reply.

Very truly yours,



MICHAEL G. COLANTUONO
City Attorney
City of La Habra Heights

MGC:mmi

c: Mayor Carroll and Members of the La Habra Heights City Council
Chairman Wolfe and Members of the La Habra Heights Planning Commission
John Hendrickson, City Manager
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