



Agenda Item #: \_\_\_\_\_



# Staff Report

## City of Manhattan Beach

**TO:** Honorable Mayor Montgomery and Members of the City Council

**THROUGH:** David N. Carmany, City Manager

**FROM:** Leland Dolley, Interim City Attorney  
Christi Hogin, Special Counsel

**DATE:** April 19, 2011

**SUBJECT:** Response to Demand for a Cure

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**RECOMMENDATION:**

Staff recommends that the City Council receive and file this report.

**FISCAL IMPLICATION:**

There are no fiscal implications to the City associated with the recommended action.

**DISCUSSION:**

In a letter dated April 5, 2011, Viet Ngo asserted violations of the Brown Act and other laws and demanded that the City Council take action to cure or correct the alleged violations. A copy of his letter is attached to this report. The City takes all such allegations seriously, even when, after careful review of the facts, the allegations are discovered to be meritless. Each of Mr. Ngo's concerns enumerated in his letter is addressed below. As explained in detail below, none of his claims requires any action by the City Council.

*Broadcast of City Council Meetings*

Government Code section 54953.6 provides that the City may not prohibit the broadcast of its open and public meetings, unless it reasonably finds that the noise, illumination or view obstruction<sup>1</sup> would create a "persistent disruption of the proceedings." This provision of the Brown Act protects the media's right to broadcast the City's public meetings. The media has been present at several of the City Council's recent meetings.

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<sup>1</sup> The statute was drafted at a time when broadcast camera equipment was much larger than modern equipment.

Mr. Ngo is concerned that the City did not itself broadcast the open and public portions of its recent Special meetings. The Brown Act does not require that the City broadcast its meetings. All special meetings of the City Council were properly noticed, with agendas publicly posted and they were convened and adjourned in public, specifically including the two special meetings held on March 15, 2011 and April 5, 2011, which Mr. Ngo references in his letter.

Under certain circumstances, before a lawsuit may be filed challenging an action of the City Council, the Brown Act requires that the interested party make a written demand on the City which clearly describes the challenged action and the nature of the alleged violation. Mr. Ngo's letter does not cite any of the sections of the Brown Act for which the demand and cure procedure applies; however, as a courtesy to him, staff has investigated his claim. The meetings were properly convened in public and all required closed session announcements were made in public. Mr. Ngo was present and appeared to be video-taping the open and public proceedings, as is his right to do. The basis of Mr. Ngo's demand seems to stem from misunderstanding that Government Code section 54953.6 requires the City generally to *allow* the broadcast by the media of the City's open and public meetings; it does not require the City to itself broadcast meetings.<sup>2</sup>

*Minutes of City Council Meetings*

Government Code section 36814 provides as follows: "The Council shall cause the Clerk to keep a correct record of its proceedings. At the request of a member, the City Clerk shall enter the ayes and noes in the journal."

Mr. Ngo asserts that the minutes of the City Council meetings are either inaccurate or have not been adopted. The City Council approves minutes regularly on its Consent Calendar. If anyone believes that the minutes are incomplete or inaccurate, City Council meeting procedures allows him to request that the item be excluded from the Consent Calendar and he will be given the opportunity to address the matter prior to the City Council's action on the minutes, which action may include any appropriate amendments based on public comment. This procedure assures public participation and compliance with Government Code section 36814.

Note that the City is required to keep a correct record of its actions but no particular level of detail is required with respect to the description of the proceedings, other than an accurate record of the votes taken. The level of detail in its minutes is left to the discretion of the City Council.

Finally, at the April 5, 2011, meeting, the City Council was presented with minutes of meetings that occurred before Councilmembers Howorth and Lesser took office. Consequently, the newly-sworn Councilmembers would abstain from a vote to approve the minutes for meetings before they assumed office. Because Councilmember Tell was absent from the meeting, the City Council lacked a quorum of qualified City Councilmembers to approve those minutes. The minutes for those meetings were excluded from the Consent Calendar at staff's request and have been resubmitted on tonight's consent calendar for consideration by Councilmembers

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<sup>2</sup> The City's voluntary broadcast of substantive public meetings is an allocation of resources that promotes open government. The cost-benefit analysis tips in a different direction in those cases where the special meeting agenda is particularly limited or devoted primarily to closed session.

Montgomery, Tell and Powell, who were present at those meetings. There is no provision of law that requires the City Council to approve minutes within a specified time. These minutes have been timely presented well within a reasonable amount of time after the meeting for which the minutes have been prepared. Thus, Mr. Ngo's concerns about the accuracy of minutes or the minor delay in the adoption of minutes are misplaced.

Approval of the McKee Settlement Agreement

The City Council may approve a settlement in Closed Session as long as it publicly reports the action and the vote of each member. With respect to the settlement of pending litigation, such as the *McKee* case, if the City has a signed settlement offer by the opposing party, the City must identify the substance of the agreement in the open session. This requirement is found in Government Code section 54957.1. The requirement itself demonstrates that the Brown Act contemplates that settlement agreements may be approved in closed session. At its March 15, 2011 meeting, the City announced the unanimous approval of the *McKee* settlement and specifically set out the terms of the agreement during the open session. These actions were all taken in accord with the Brown Act.

There is one exception to a city's general authority to settle lawsuits in Closed Session. If the settlement involves matters that otherwise require a public hearing, obviously, the City may not enter into an agreement that purports to obligate the city without a required hearing. It is not a settlement agreement *per se* that ever requires a public hearing, but rather if any of the obligations of the City under the agreement would have required a public hearing than the agreement cannot replace the hearing. The best and most frequent example of matters that require hearings are land use entitlements. A city may not enter into a settlement to re-zone property because rezoning requires a public hearing with special notice. A city could only agree in a settlement to hold the hearing in the future but the agreement could not determine the outcome of the hearing.

None of the City's obligations under the *McKee* settlement required a public hearing: the settlement committed the City to hold certain training, pay attorney's fees, reconsider copying charge and release certain information and public records subject to disclosure under the Public Records Act. Moreover, the settlement agreement was immediately made available to the press and the public, including Mr. Ngo upon his request.

Conflict of Interest

Mr. Ngo cites Government Code section 1090 and the Political Reform Act in his letter but does not provide any specific information with respect to his concerns. However, in public comments addressed to the City Council, Mr. Ngo has expressed concern over the fact that the *McKee* lawsuit names as defendants both the City of Manhattan Beach and the Manhattan Beach City Council.<sup>3</sup> Specifically, Mr. Ngo has questioned whether the individual City Councilmembers are personally interested in the lawsuit, creating a conflict of interest preventing them from being able to act on the City's behalf.

Government Code section 1090 is essentially the prohibition against self-dealing in city contracts. It is illegal for city officials to be involved in the making of a contract from which they personally benefit. The Political Reform Act prevents public officials from being involved in government decisions in which they have a financial interest. Neither of these laws is implicated when a City Council is named in its official capacity, as was the case in the *McKee* case. The lawsuit was a writ of mandate proceeding brought under the Code of Civil Procedure section 1085 and request for a declaratory relief under Code of Civil Procedure section 1060. These are special judicial remedies designed, among other reasons, specifically to provide an opportunity for interested parties to obtain judicial review of the action of a public entity. The individual City Councilmembers were not named personally and were not subject to any possible personal liability in the lawsuit. The lawsuit exclusively challenged the official acts of the City taken by its City Council within the scope of the duties of the City Councilmembers. For that reason, the City Councilmembers had no personal financial stake in the lawsuit or the settlement. The City Council acted exclusively as the governing body of the City. When the City Council entered into a contract for legal services relating to the case, none of the City Councilmembers benefitted financially personally from that contract. All of the actions taken by the City Council were taken with the singular purpose of managing the City's legal affairs and responding to a lawsuit against the City, which also named the "City Council" as the governing body.

Response

Under the Brown Act, the City Council has 30 days within which to respond to the demand to cure or correct the challenged action and inform the demanding party of the City's action or its decision to take no action. If the City takes no action, by operation of law the City is deemed to have decided to take no action and the demanding party may pursue litigation.

Mr. Ngo's complaints are mostly not related to the Brown Act. The City is not required to broadcast its meetings and it will continue to broadcast regular meetings, resources permitting. The City has not and will not prohibit the broadcast by others of open and public meetings (assuming the noise and illumination in any given instance does not impair the ability to conduct the meeting). For these reason, I am not recommending any further action in response to Mr. Ngo's demand for a cure under the Brown Act.

Attachments: 1. Viet Ngo's Letter Dated April 5, 2011

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<sup>3</sup> Paragraph 2 of the *McKee* complaint identifies the "Manhattan Beach City Council" as an entity and the complaint does not name any individual members as defendants in the lawsuit. The City Council is the governing body of the City, akin to the board of directors of a corporation.

2011 APR -3 11:12:12

Viet Ngo  
600 Manhattan Avenue, Manhattan Beach, CA 90266  
(310) 318-2769

April 5, 2011

Mayor Richard Montgomery, Council Members Nick Tell, Wayne Powell, Amy Howorth, and David Lesser  
City Manager David Carmany  
City Attorney Robert V. Wadden, Jr.  
Human Resources Director, Cathy Hansen  
Acting City Attorney Christie Hogin  
City Hall  
City of Manhattan Beach  
1400 Highland Avenue  
Manhattan Beach, CA 90266

Re:    1. Brown Act Demand for Cure or Make Correction Pursuant to California Government Code Section 54950 et seq.  
       2. Brown Act Demand for Compliance to Brown Act; Government Code 54953.6, Broadcast, April 5, 2011, 1:30 PM City Council Special Meeting  
       3. Demand for Cure or Make Corrections on Minutes of the City Council Special Meeting, March 15, 2011, 4:30 PM, [Public Comment on Closed Session Agenda] and March 15, 2011, 6:30 PM Regularly Scheduled Meeting Pursuant to Political Reform Act of 1974; California Government Code Section 36814  
       4. Brown Act Demand for Cure or Make Correction of the Action Taken in Approval of Settlement of McKee v. City Council of Manhattan Beach, Los Angeles Superior Court, Case # BS126038, on March 15, 2011

Dear Mayor Richard Montgomery, Council Members Tell, Powell, Howorth, and Lesser; City Manager David Carmany; City Attorney Robert V. Wadden, Jr.; Human Resources Director, Cathy Hansen; and, Acting City Attorney Christie Hogin:

From December, 2010 to the present time many Special City Council meetings without broadcasting constitute prohibited actions in violation the Brown Act. Further, the City Council did not produce and/or inaccurately produce accurate minutes of Special City Council meetings.

I demand that the City Council take action to cure or make corrections of violations of the Brown Act, the Political Reform Act, California Government Code Section 36814 and Section 1090.

Most Respectfully Submitted For Your Action Required By Law,

  
Viet Ngo