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BY E-MAIL ONLY

June 4, 2020

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Vice Mayor Mike Carroll
Councilmember Melissa Fox
Councilmember Farrah N. Khan
Councilmember Anthony Kuo
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Re: 2400 Barranca Parkway Project: Request for Continuance

Dear Mayor Shea, Vice Mayor Carroll, Honorable Members of the City Council:

I am writing on behalf of the Supporters' Alliance for Environmental Responsibility ("SAFER"), a California non-profit organization, and its members living and/or working in or around the City of Irvine ("City") concerning the 2400 Barranca Parkway Project (SCH. 2007011024) within Planning Area 36 of the Irvine Business Complex ("IBC") (the "Project") and the related Addendum to the IBC Vision Plan and Mixed Use Overlay Zoning Code Final Environmental Impact Report, certified by the City Council on July 13, 2010. We urge the City to continue the City Council hearing currently scheduled for June 9, 2020 until after the lifting of the COVID-19 State of Emergency. This is a highly controversial Project that has been years in the planning. It is not possible for the interested public to adequately participate in the decision-making process during the State of Emergency. The City will be conducting the hearing virtually through Zoom, without adequate provisions to allow the public to directly address the Council. Since this matter is not an emergency matter, there is no reason to conduct this hearing during the State of Emergency, and the matter should be continued to a time when the public can participate

fully and actively. As discussed below, the City's procedures violate the Brown Act and render any decision null and void.

BROWN ACT

We ask the City to continue consideration of the Project until after the COVID-19 State of Emergency is lifted. The state of emergency makes it impossible for the public to actively participate in public meetings at which the Project will be considered. Since the Project does not pose any emergency, there is no reason that its consideration cannot be continued until after the state of emergency is lifted and the City is once again able to conduct regular meetings with public attendance. Many residents and nearby landowners would like to address the City Council, but City Staff has made clear that there will be no opportunity for the public to make oral comments to the Council, in clear violation of the Brown Act.

As discussed below the Governor did not have authority to suspend the Brown Act since the Brown Act is in the California Constitution. As a result, if the City approves the Project without full compliance with the Brown Act, the decision will be null and void.

A. The City Must Comply with the Brown Act as Codified Regardless of the Governor's Executive Orders

To the extent that Governor Newsom's Executive Order ("EO") N-29-20 of March 17, 2020 ("March 17 EO") and EO N-35 20 of March 21, 2020 ("March 21 EO") modified, amended, or otherwise revised the Brown Act, the EOs are invalid under the California Constitution, article I, section 3(b)(7) ("section 3(b)(7)").

In 2014, California voters passed Proposition 42 which amended the California Constitution to read, in relevant part:

> [E]ach local agency is hereby required to comply with . . . the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section. (Cal. Const., art. I § 3(b)(7)[1])

[1] The full text of Cal. Const., art. I § 3(b)(7):

> In order to ensure public access to the meetings of public bodies and the writings of public officials and agencies, as specified in paragraph (1), each local agency is hereby required to comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section.

By the plain language of section 3(b)(7), local agencies are required to comply with the Brown Act as codified. Furthermore, "statutory enactment"—not executive order—is the only constitutionally permissible means of amending the Brown Act under section 3(b)(7). Black Law's Dictionary defines "statute" as "**An act of the legislature**; a particular law enacted and established by the will of the legislative department of government, expressed with the requisite formalities." Since the California legislature has not amended the Brown Act, the California Constitution requires that local agencies comply with the Brown Act as codified regardless of Governor Newsom's EOs.

In both the March 17 EO and March 21 EO, Governor Newsom cites Government Code sections 8567 and 8571 as the authority for his power to amend the Brown Act during the COVID-19 state of emergency. (March 17 EO, p. 1; March 21 EO, p. 1.) However, neither of these provisions are part of the Constitution, unlike the Brown Act itself. Therefore, neither of those provisions grant—nor could they grant—the executive the power to override the California Constitution. Government Code section 8567 states:

> (a) The Governor **may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter**. The orders and regulations shall have the force and effect of law. . . .
> (b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect. (Gov. Code § 8657.)

Government Code section 8571 states:

> During a state of war emergency or a state of emergency the Governor **may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business**, or the orders, rules, or regulations of any state agency . . . where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency. (Gov. Code § 8571.)

Although these provisions allow the Governor to make orders and regulations to carry out the Government Code (including the Brown Act) and to suspend certain statutes, Government Code sections 8567 and 8571 do not grant the Governor the authority to override the California Constitution, which requires compliance with the Brown Act subject to amendment only by the legislative branch. (Cal. Const., art. I § 3(b)(7).) Most importantly, neither of these provisions are in the Constitution. It is black-letter law that a statutory provision may not contradict a Constitutional provision. As such, to the extent that a local agency relies on Governor Newsom's March 17 EO and March 21 EO instead of on the Brown Act directly, the agency is in violation of the California Constitution, article I, section 3(b)(7).

B. The Brown Act Requires That the Public Be Allowed to Comment at a Hearing

The Brown Act already contains provisions for conducting public meetings by teleconferencing and video conferencing. Under the Brown Act, "[T]he **legislative body of a local agency may use teleconferencing** for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law." (Gov. Code § 54953(b)(1).) The Brown Act defines "teleconference" as "a meeting of a legislative body, the members of which are in different locations, connected by **electronic means, through either audio or video, or both**." (Gov. Code § 54953(b)(4).)

When a local agency uses teleconferencing, the Brown Act requires that the teleconference information be available in the meeting agenda and that the teleconference be accessible to the public. (Gov. Code § 54953(b)(3).) Importantly, the Brown Act further requires that the agenda "**provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.**" (Gov. Code § 54953(b)(3).) The above requirement of section 54953(b)(3) of the Brown Act allows for the use of teleconferencing to satisfy the requirements of section 54954.3 that members of the public have the opportunity to comment on an agenda item either before or during a meeting. (Gov. Code § 54954.3(a) ["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."].) As such, any public meeting conducted by teleconference but does not allow for public comment during the meeting is in violation of the Brown Act.

C. Local Agencies Must Allow for Public Comment During a Public Meeting

The Brown Act does contain emergency provisions—however, none of these provisions provide for prohibiting public comment during a meeting.

First, the Brown Act allows public meetings in certain emergency circumstances with limited (one-hour) or no prior notice. (Gov. Code § 54956.5.) Second, the Brown Act contains authority allowing action on items not included on a posted regular agenda in certain emergency situations. (Gov. Code § 54954.2(b)(2).) Lastly, in certain emergency situations, the Brown Act allows for a public meeting location to change without notice as long as local media is notified "by the most rapid means of communication available at the time." (Gov. Code § 54954(e).) The 2400 Barranca Project does not qualify as an "emergency" within the meaning of the Brown Act.

Notably, the emergency provisions above in the Brown Act pertain only to notice, location, and agency action. No provision of the Brown Act contemplates abrogating the public's right to provide comment during a public meeting either in-person or, if necessary, by teleconferencing or video conferencing. (*See* Gov. Code §§ 54953(b)(1), (b)(3), (b)(4).)

Even if Governor Newsom's March 17 EO and March 21 EO were valid under the California Constitution as to the Brown Act, a local agency which does not permit public comment during a public meeting fails to comply with those orders. The March 17 EO explicitly states:

> All state and local bodies are urged to use sound discretion and to make reasonable efforts to **adhere as closely as reasonably possible to the**

> **provisions of the Bagley-Keene Act and the Brown Act**, and other applicable local laws regulating the conduct of public meetings**, in order to maximize transparency and provide the public access to their meetings**. (March 17 EO, p. 4.)

Many municipalities are making public comment during teleconferenced meetings possible, which shows that adherence to the Brown Act provisions discussed above is possible during the COVID-19 state of emergency. For example, the Cities of San Francisco, Los Angeles, and other cities allow members of the public to directly address the decision-making body through Zoom or other teleconference service during the virtual meeting. Thus, any local agency which does not provide for direct public comment during a public meeting—teleconferenced or otherwise—is in violation of the California Constitution, article I, section 3(b)(7) and the Brown Act as well as in violation of Governor Newsom's executive orders.

For the above reasons, we request that the City continue consideration of the Project until after the lifting of the COVID-19 State of Emergency to allow full public participation and full compliance with the Brown Act and the California Constitution.

Sincerely,

Paige Fennie
LOZEAU DRURY LLP