

February 7, 2008

Whittier City Council
City Hall – 13230 Penn Street
Whittier, California 90602

Delivery by: USPS Mail & e-mail to:
admin@cityofwhittier.org
cct@cityofwhittier.org
rdj@jones-mayer.com

Subject: Demand for Cure or Correction, made pursuant to Government Code §§ 54960 & 54960.1

Dear City Council:

At your meeting of January 22, 2008, the posted agenda listed, under business item 15. CITY COUNCIL/REDEVELOPMENT AGENCY CLOSED SESSION:

- 15.B** City Council - Government Code Section 54956.9(b) to discuss one case of potential litigation. The City is not specifically identifying the potential litigation to be discussed or the facts supporting this Closed Session item because to do so would jeopardize the City's position.

While in that closed session, it is reported that the Council discussed a letter received by the City on January 10, 2008, from Peter and Tomoko Lennihan, citing safety issues in regard to "city owned Ficus trees in the causeway on Broadway St. abutting [their] house." This letter contained no threat of litigation. Still, the City Council refused to identify the "existing facts and circumstances" prior to holding the closed session, as required by the Brown Act, § 54956.9(b)(3).

In fact, the City went further, confusing the public by implying that the Council was not required by law to identify the facts and circumstances surrounding anticipated litigation when "to do so would jeopardize the City's position." Not only is this not the law¹, it perpetrates a fraud upon the public, because revealing the facts within this letter could not possibly jeopardize the City's position in any litigation brought by the Lennihan's in the future.

As noted in the California Attorney General's pamphlet, THE BROWN ACT: Open Meetings for Local Legislative Bodies (2003)(AG), "the fact that material may be sensitive, embarrassing or controversial does not justify application of a closed session unless it is authorized by some specific exception. (*Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 235.) Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters." (AG at 30.) Citing 71 Ops.Cal.Atty.Gen. 96, 105 (1988), the

¹ In truth, § 54956.9(b) only allows the City Council to withhold the required announcement of the "existing facts and circumstances" when "the local agency believes [the facts and circumstances] are not yet known to a potential plaintiff or plaintiffs." (Gov't Code § 54956.9(b)(3)(A).)

Attorney General concludes that the “mere possibility of judicial review does not constitute significant exposure to litigation based on existing facts and circumstances.” (AG at 38.)

Whittier City Council
Brown Act Demand
2/7/08 – Page 2

By refusing to publicly acknowledge that the receipt of the Lennihan’s letter was being used by the City to justify (authorize) this anticipated litigation closed session, the Council denied all interested members of the public of proper notice and of the opportunity guaranteed by the Brown Act to directly address the Council on any closed session item prior to the Council’s discussion of that item.

The Lennihan’s letter did not authorize a closed session under § 54956.9(b); and even if it did, the City would have been required to announce the existing facts and circumstances under subparagraph (C) of § 54956.9(b)(3), prior to holding any such closed session. Therefore, the Council was in violation of Government Code §§ 54954.2, 54954.3, 54954.5, 54956.9, 54957.7, and 54962.

REMEDY DEMANDED:

Within 30 calendar days of the City’s receipt of this Demand letter, the Council shall, by formal action taken, publicly announce that:

- (a) on January 22, 2008, the Council erred by considering and acting upon the Lennihan’s letter in closed session;
- (b) on January 22, 2008, the Council erred by failing to publicly state on the agenda or announce the existing facts and circumstances authorizing the closed session, agenda item 15.B; and
- (c) the Council will, in the future, consider such a non-threatening, written request for service or similar letter of concern only in an open and public session.

Should the City Council fail to take the actions demanded above within the 30-day period to remedy its violations, it will be assumed: that the Council disagrees with my position as to the proper performance of its ministerial duties under the Brown Act; that, in the future, the Council intends to continue to consider similar, non-threatening letters in closed session; and that an actual controversy exists between us as to the rights of the public and the duties of this local agency under the open meetings law (Government Code § 54950 *et seq.*).

Most respectfully submitted for your action as required by law,

Richard P. McKee

Richard P. McKee

The First Amendment - Freedom of Speech, Press, Assembly & Right to Petition
California Public Records Act –

Access to Governmental Records

Ralph M. Brown Act – Open and Public Meetings

◆◆◆
Dennis Winston, Moskowitz Brestoff Winston & Blinderman LLP, denniswinston@yahoo.com
Jim Ewert, California Newspaper Publishers Association, jim@cnpa.com