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October 12, 2017

Mayor Libby Schaaf
President Larry Reid and Members of the City Council
City Administrator Sabrina Landreth
One Frank Ogawa Plaza
Oakland, California 94612

PUBLIC LEGAL OPINION

Re: Ralph M. Brown Act, Oakland Sunshine Ordinance and City Council Rules of Procedures Do Not Require that the City Council Allow Members of the Public to Speak on Unscheduled Motions to Place an Item or Items on a Future Meeting Agenda

Dear Mayor Schaaf, President Reid and Members of the City Council, and City Administrator Landreth:

I. Introduction

Members of the public sometimes request the opportunity to speak before the Council votes on an unscheduled motion to place an item on a future meeting agenda or defers or reschedules an agenda item to a future meeting. This opinion clarifies the public speaker requirements under the Ralph M. Brown Act (“Brown Act”),¹ Oakland’s Sunshine Ordinance² and the City Council’s Rules of Procedure³ for impromptu (i.e., unscheduled) motions during a public meeting to place an item on a future meeting agenda. This opinion also distinguishes the process the Council’s Rules of Procedure provides for the Rules and Legislation Committee to establish agendas for and schedule items to Council and Council Committee items.

¹ Codified at California Government Code 54950, et seq.

² Codified at Oakland Municipal Code Ch. 2.20.

³ Resolution No. 86034 C.M.S.

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This is a public opinion because it interprets provisions of the Ralph M. Brown Act and Oakland's Sunshine Ordinance that govern the important rights of members of the public to participate and speak at public meetings of the City Council and City boards and commissions. Like other public legal opinions, this opinion will be posted on our website.

II. Questions and Brief Answers

Question No. 1:

Does the Ralph M. Brown Act, Oakland's Sunshine Ordinance or the Oakland City Council's Rules of Procedure require that the Council allow members of the public to speak on impromptu (i.e., unscheduled) motions to schedule new items to a future meeting agenda or defer agenda items to a future meeting?

Brief Answer:

No. The Brown Act, Sunshine Ordinance and the Council's Rules of Procedure do not require that the Council or Council Committees give members of the public an opportunity to speak on scheduling motions. Accordingly, the City Council is free to discuss and pass motions to schedule new items to the agenda of a future public meeting at any time without noticing the scheduling item on the agenda or granting members of the public the opportunity to speak to the motion. The Council also may defer/reschedule an agenda item to a future meeting without granting members of the public the opportunity to speak on the deferral/rescheduling action; but the Brown Act and Sunshine Ordinance require that the Council/Council Committee give members of public the opportunity to speak on the substance of deferred/rescheduled agenda items.

Question No. 2:

Why are members of the public allowed to speak on items that are scheduled to future Council and committee meetings at the Council's Rules and Legislation Committee meetings?

Brief Answer:

As noted in the answer to Question No. 1, the Brown Act and Sunshine Ordinance do NOT require that the Council give members of the public the opportunity

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to speak on scheduling motions. However, the Council's Rules of Procedure Resolution No. 86034 C.M.S establishes a public process for scheduling items to Council and Council Committee meetings. Rule 24 of the Council's Rules of Procedure authorizes the Rules and Legislation Committee to establish agendas for Council and Council Committee meetings.⁵ To establish the agendas, the Rules Committee's weekly agendas include an item entitled "Scheduling of Agenda Items." At its weekly meetings, the Rules Committee gives the public the opportunity to speak on all items proposed for scheduling as well as changes to items scheduled on upcoming agendas before the Rules Committee takes action.

III. Analysis

A. The Brown Act and Sunshine Ordinance require that the Council and Council Committees grant members of the public the opportunity to speak on publicly noticed agenda items before the Council takes action

The Ralph M. Brown Act ("Brown Act") provides that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided [by the Ralph M. Brown Act]." Gov. Code § 54953. The Council is the legislative body of the City of Oakland. City Charter § 207. With certain exceptions specified in the Brown Act, the Council cannot take action on items that do not appear on the publicly noticed agenda.⁶ The Ralph M. Brown Act mandates that the Council/Council Committees give members of the public an opportunity to speak on agenda items "before or during" consideration of the item. Government Code § 54954.3 provides in relevant part:

(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

⁵ The City Council's Rules of Procedures establish several Council subcommittees with subject matter jurisdiction – Rules and Legislation, Finance, Public Works, Community and Economic Development, Life Enrichment, Education Partnership, and Public Safety. CRP Rule 4, Resolution No. 86034 C.M.S.

⁶ The Brown Act requires that public agency agendas for meetings be posted at least 72 hours in advance of a regular meeting. Gov. Code § 54952.2.a. However, Oakland's Sunshine Ordinance, codified at Oakland Municipal Code Chapter 2.20, requires that council and council committee agendas be posted 10-days in advance of a regular meeting. O.M.C. § 2.20.080.A.

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interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. . . . Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.

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In addition, the courts have interpreted section 54954.3 to require that public agencies provide a public comment period for members of the public to speak at a designated time on any matters of interest to the public, including matters that have not been noticed on the agenda at a particular meeting. See, *Galbiso v. Orosi Public Utility Dist.*, 167 Cal.App.4th 1063, 1080 (2008). Open forum (Oakland's public comment period) is also required by Rule 13 of the Council Rules of Procedure. Resolution No. 86034 C.M.S.

B. The Public's Right to Speak on Agenda Items Under the Brown Act, Oakland Sunshine Ordinance and Council Rules Of Procedure Speaker Procedures Does Not Apply To Motions To *Schedule* Items To A Future Meeting

The Brown Act and Sunshine Ordinance protect the public's right to speak to agenda items before the Council takes action. When the Council or a Council Committee makes and passes a motion to schedule a new item to a future meeting or defers/reschedules an agenda item to a future meeting, the public retains the right to speak to the item on the scheduled date as required by the Brown Act and Sunshine Ordinance. A recent decision by the California Court of Appeal addressed the specific question whether the Brown Act requires that members of public be given the opportunity to address the legislative body regarding a scheduling motion. *Coalition of Labor Agriculture and Business v. County of Santa Barbara Board of Sups.*, 129 Cal.App.4th 205 (2005)

In *Coalition of Labor Agriculture and Business v. County of Santa Barbara Board of Sups.*, the California Court of Appeals ruled that the Brown Act does NOT require the Board to allow members of the public to address the Board concerning whether an item

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should be placed on an agenda. The Court considered whether the Brown Act required that the Santa Barbara County Board of Supervisors give the public the opportunity to speak to an impromptu motion to add a new item to the agenda for the meeting, pursuant to the Brown Act's exception for emergency items. Gov. Code § 54954.3. The Board discussed the impromptu motion to add the item to the meeting agenda as an emergency item and did not pass the motion. Members of the public wanted to speak to the scheduling motion, but the Board did not allow them to do so. Nonprofits sued alleging a Brown Act violation because the public wasn't allowed to speak.

The *Coalition* court expressly refused to interpret the language of Government Code section 54954.3 regarding the public's right to speak "before or during consideration" of agenda items and the language providing the right to speak "on any item of interest to the public" to require that the Board allow the public to address whether or not to place an item on the agenda. The court noted that the Brown Act's purpose of encouraging public participation in government decision-making is met "when the public has notice of and the right to comment on an *agenda item before or during its consideration*. The Legislature has left to the public agency the task of setting its agenda without public comment." *Id.*, at p. 209 – 210, italics added.

Oakland's Sunshine Ordinance also does not require that the Council allow members of the public to address the Council on impromptu motions to schedule new items to a future meeting. Oakland Municipal Code § 2.20.150.A essentially reiterates Government Code § 54954.3. Further, the Council Rules of Procedure only speak to the public's right to a general comment period (i.e., comment in public forum) and to speak on "agenda items", i.e. items described on the face of the agenda. See Council Rules 13 and 14, respectively. Resolution No. 86034 C.M.S.

Hence, impromptu motions to schedule items to a future meeting that do not appear on the agenda, are not subject to the public speaker requirements of the Brown Act, Oakland Sunshine Ordinance or the Council's Rules of Procedure. Furthermore, there is no requirement that the Council or Council Committees give the public the opportunity to speak to a motion to defer an agenda item to a future meeting. For example, the City Council has a specific agenda item entitled "Modifications to the Agenda" under which the Council may add items (subject to an urgency or emergency finding), or implicitly or explicitly pass a motion to defer an agenda item to a future meeting. Regarding the latter, the Council is obligated to allow public speakers to address the agenda item that has been deferred, but the public speakers are not entitled to speak to the scheduling motion.

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C. The City Council's Rules of Procedure Provide Members Of The Public An Opportunity To Speak On The Scheduling Of Agenda Items For Future Meetings At The Rules and Legislation Committee Meeting

As a practical matter, the public is provided an opportunity to comment on the scheduling of most items for Council and committee meetings at the time the items are scheduled. Although the Brown Act and Sunshine Ordinance do not require public comment on scheduling motions, the Council's Rules of Procedure provide that the Rules and Legislation Committee establishes agendas for upcoming Council and committee meetings under an item entitled "Scheduling of Agenda Items." Rule 24 provides, in part:

. . . the Rules Committee shall have jurisdiction to assign all proposed agenda items to committees and/or full Council for consideration and action as follows:

1. One or more members of the City Council, a committee of the City Council, the Mayor, the City Administrator, City Attorney, City Auditor and any member of the public may propose an agenda item for Council consideration to the Rules and Legislation Committee for assignment and scheduling through procedures established by the Rules and Legislation Committee.
2. Rules and Legislation Committee shall have the following options to assign and schedule any and all proposed resolutions and ordinances of the City Council:
 - a. to a subject-matter committee, or
 - b. to staff for review and report back to the requestor, or
 - c. directly to City Council pursuant to "3" below.
3. Rules and Legislation Committee shall not refer any action item directly to the full City Council unless the Committee determines by a majority vote of those present that the item should proceed directly to the City Council for a specified reason.

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4. Rules and Legislation Committee shall assign and schedule any informational item for consideration and acceptance either by a committee or directly by the full Council.
5. The Rules and Legislation Committee shall have sole authority in establishing specific agenda items to be placed on the agenda. Rules and Legislation Committee shall establish the consent and non-consent agenda items of the City Council agenda.

The Rules Committee holds regular, weekly meetings on Thursdays at 10:45 am to, among other things, schedule items to future Council and committee meetings and to finalize upcoming agendas under specific items identified on the Rules Committee agenda.⁷ The City Clerk regularly issues a Rules Committee agenda on Wednesday afternoons listing specific scheduling items:

4. Scheduling Of Agenda Items And Revisions To Previously Distributed 10-Day Agendas
5. A Review Of The Draft Agendas For The City Council Meeting Of [date] And The Rules And Legislation Committee Of [date]

Under these items the Rules Committee considers, among other things, scheduling items described on the face of the agenda, new scheduling items submitted to the Committee at the meeting either on the dais or from the floor, and proposed adjustments to items listed on the agendas for upcoming meetings. The public is provided an opportunity to speak on all scheduling items and scheduling adjustments considered under items 4 and 5 of the committee agenda before the Rules Committee takes final action.

Members of the public also are provided several opportunities to propose items for consideration at future meetings. Rule 24.1 provides: “. . . any member of the public

⁷ From time to time it is not feasible to publicly schedule a matter. Subject to some limitations, Rule 28 of the Council's Rules of Procedure authorizes the Rules Committee Chair, Mayor or City Administrator and Council President to schedule items provided there is compliance with the Brown Act and Sunshine. Consistent with public speaker requirements, the public is provided an opportunity to speak on the substance of items scheduled in this manner when they come before a committee or the Council for discussion.

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may propose an agenda item for . . . Council consideration to the Rules [Committee] for consideration and scheduling.” Members of the public also may request that the Rules Committee schedule items when they speak at Council and committee meetings in open forum or on specific agenda items.

IV. Conclusion

To summarize, the California courts have specifically ruled that the Brown Act does not require legislative bodies like the City Council or Council Committees to allow members of the public to address the body concerning whether an item should be placed on an agenda. *Coalition of Labor Agriculture and Business v. County of Santa Barbara Board of Sups.* 5, 129 Cal.App.4th 205 (2005). Further, neither Oakland’s Sunshine Ordinance, nor the Council Rules of Procedure Resolution No. 86034 C.M.S., requires that the Council give members of the public the opportunity to speak on impromptu scheduling motions or on motions to defer/reschedule agenda items to a future meeting. Regarding the latter, the Council is obligated to permit members of the public to speak on the substance of an agenda item that is deferred or rescheduled to a future meeting.

In the interest of transparency, the City Council has established a public process through its Rules and Legislation Committee to receive public comment on the scheduling of new items to upcoming meetings. This public scheduling process provides members of the public the opportunity to comment on most matters that are scheduled to Council and Council committee meetings for consideration.

Very truly yours,



BARBARA J. PARKER
City Attorney

Attorney Assigned:
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