



WORKING PARTNERSHIPS USA

November 13, 2018

San Jose City Clerk
200 E. Santa Clara St.
San Jose, CA 95113
cityclerk@sanjoseca.gov

San Jose City Council
200 E. Santa Clara St.
San Jose, CA 95113

Via U.S. Mail and Email to cityclerk@sanjoseca.gov

**NOTICE OF VIOLATIONS OF THE BROWN ACT (GOV. CODE § 54950 *et seq.*)
DEMAND TO CEASE AND DESIST, CURE AND CORRECT BROWN ACT
VIOLATIONS**

Dear City Clerk and Members of the City Council:

We write on behalf of the First Amendment Coalition (“FAC”) and Working Partnerships USA (“WPUSA”) regarding multiple failures by the San Jose City Council (“City Council”) to comply with the requirements of California’s open meetings law, the Ralph M. Brown Act, Government Code section 54950 *et seq.* (“Brown Act”). This letter serves as a demand to cease and desist the practices constituting such violations, and to cure and correct violations that have already occurred.

Please direct all correspondence to the following email addresses:
dsnyder@firstamendmentcoalition.org; derecka@wpusa.org.

The City Council’s Brown Act violations arise out of numerous closed session meetings regarding the potential acquisition by Google of City-owned property in the Diridon Station Area (the “Property”), the development of the Property and adjacent parcels (the “Project”), and related subjects. As more specifically described below, the City Council has engaged in collective deliberation in closed session regarding a range of topics outside the scope of what is permitted under Cal. Gov’t Code § 54956.8, and has failed to adequately describe these topics in public agendas as required under Cal. Gov’t Code § 54954.2(a). This letter constitutes a demand pursuant to the Brown Act that the

city (a) cease and desist such practices and (b) cure and correct “actions taken” in violation of the Brown Act.

The Unlawful Closed Sessions

Since at least June 13, 2017, and continuing to the present, the City has agendized closed sessions using a virtually identical description of an item relating to the Property. This agenda item reads: “CONFERENCE WITH REAL PROPERTY DESIGNATED REPRESENTATIVES PURSUANT TO GOVERNMENT CODE SECTION 54956.8.” The agenda names Nancy Klein for the City and “Jay Bechtel for Google” as the “Negotiating Parties,” and lists a series of parcels involved in the transaction. The only other element of the description of the closed session reads: “Under Negotiation: The direction will concern price and terms of payment.”

The above language has appeared on twenty-four public closed session agendas of the City Council, specifically: June 13, 2017; June 20, 2017; June 27, 2017; Aug. 8, 2017; Aug. 15, 2017; Aug. 22, 2017; Aug. 29, 2017; Sept. 12, 2017; Sept. 19, 2017; Sept. 26, 2017; Oct. 3, 2017; Oct. 17, 2017; Nov. 28, 2017; Dec. 5, 2017; Jan. 9, 2018; Jan. 23, 2018; Jan. 30, 2018; June 12, 2018; June 19, 2018; Sept. 18, 2018; Oct. 2, 2018; Oct. 16, 2018; Oct. 23, 2018; Nov. 6, 2018.

On May 14, 2018, First Amendment Coalition submitted to the City a written request for information under the California Public Records Act (CPRA). Among the records requested therein were “[a]ny records of or relating to any closed session of the San Jose City Council during which the Proposed Google Development was the subject of any discussion or information presented or the decision to enter into any such closed session and any materials made available or discussed during any such closed session.” The request defined “Proposed Google Development” as “the proposed Google development in the Diridon Station Area, including but not limited to communications relating to the sale of city-owned land, the appraisal of city-owned land, project concepts and design, land-use planning, the acquisition of parcels, and/or the “Spartan” project.”

Despite the fact that as of May 14, 2018, *seventeen* closed session meetings regarding the Project had appeared on the Council’s public agenda, First Amendment Coalition received from the City just *four documents* responsive to this particular request, including a document entitled “Closed Session, Diridon Appraisal Discussion, 8/7/17” (the “8/7 Agenda”). The City also produced two emails authored by Nancy Klein, the City’s negotiator, setting forth “prep notes” for briefings she apparently planned to give relating to the appraisal during closed session meetings on Aug. 22, 2017 and Aug 29, 2017 and an email exchange among city officials regarding what information to bring to the August 8, 2017 closed session.

¹ The 8/7 Agenda, Nancy Klein’s emails and the noted email exchange, are enclosed with this letter.

The 8/7 Agenda and related documents show that the City Council discussed a wide variety of matters relating to the Project, including the “approach to the appraisal,” the “compensation agreement;” and “community benefits,” as well as:

- “Community Outreach process”;
- “MOU-principles for community benefits”;
- “DA -- specific types and funding of community benefits”;
- “CEQA Required” and “Targeting first half of 2020”;
- Land acquisition for the project, including “Fire Training Center,” “SAP Center” and “AIG Option (cloud on title).”

In emails exchanged the night of August 7, 2017 and the morning of the August 8, 2017 closed session, city staff discussed yet further topics for potential discussion behind closed doors, namely the “fiscal impact” of the Google development. Although staff appeared to agree that the City Council should not be provided information about that topic in closed session “at this point,” that decision appears not to have been based on any concern about the Brown Act’s limitation. Rather, the concern was that it “seems to much to give the Council or the public at this stage of the process.”²

Although the City has failed, in violation of the CPRA, to produce similar documents as to the numerous other closed sessions held regarding the Project,³ it is clear that a similarly broad range of topics was discussed in other closed sessions the Council has had on this topic, up to and including closed sessions within the past month. Indeed, based on information provided by those in attendance at some or all of the twenty-four closed sessions, such topics were discussed repeatedly during some or all of those sessions—all beyond the scope of what is permitted under § 54956.8, and in violation of the notice requirements of § 54954.2(a).

These closed session meetings violated the Brown Act in at least two key ways.

First, the City Council violated the Brown Act by failing to properly provide notice of the items it discussed in closed sessions. The City’s agendas for the twenty-four closed sessions fail to provide notice of any of the topics listed above. However, the Brown Act requires every agenda to contain a description of **each** item of business to be discussed. (Gov. Code section 54954.2(a).) This is also required for any item to be discussed in closed session. (Gov. Code section 54957.7). “No action or discussion

² As with numerous documents provided by the city pursuant to FAC’s and WPUSA’s CPRA requests, the emails quoted here obviously included attachments that the City should have, but did not provide, in violation of the CPRA.

³ FAC and WPUSA have engaged in extensive follow-up explaining the City’s failure to meet its obligations under the CPRA. Nevertheless, the city has continued to disregard those obligations. Accordingly, FAC and WPUSA were left with no choice but to ask a court to compel compliance and, on the date of this letter, filed suit in Santa Clara Superior Court to obtain relief under the CPRA.

shall be undertaken on any item not appearing on the posted agenda,” and the body “may only consider those matters” that were included in its statement of items to be discussed in closed session. (Government Code sections 54957.7(a), 54954.2(a)(2).)

Second, any general discussion regarding the Project, such as the discussion held in closed session on August 8, as well as at many or all of the twenty-four closed sessions, must be done in open session. Except where expressly authorized by statute, “no closed session may be held by any legislative body of any local agency.” (Gov. Code section 54962.) “These exceptions have been construed narrowly; thus if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity.” (California Attorney General, *The Brown Act: Open Meetings for Local Legislative Bodies* (2003) at pg. 1.) As described by the Attorney General, “The Legislature’s addition of section 54962 effectively eliminated the possibility of finding an implied authorization for a closed session.” (88 Ops.Cal.Atty.Gen. 16 (2005).)

There is no exception to the Brown Act’s open-meetings requirement which would allow for the general discussion the City held in its closed sessions.

The City’s reference to the “real estate negotiations” exception to the Brown Act’s open-meetings requirements provides no cover for such discussion. A closed session held pursuant to Gov. Code section 54956.8 may only be held for the limited purpose of instructing the legislative body’s negotiator(s) on **price, payment terms, or both**. Gov. Code section 54956.8 (emphasis added). Any other factors affecting the transaction may not be discussed in closed session. *See, e.g., Shapiro v. San Diego City Council*, 96 Cal.App.4th 904, 910 (2002) (affirming injunction that required City Council to limit discussions at closed sessions to instructions to its negotiators regarding price and terms of payment for the purchase, sale, exchange or lease of specific real property by or for the city).

Thus, to the extent the City Council discussed any topics other than the price or payment terms of the Property, it violated the Brown Act as to each meeting in which they did so by (a) engaging in discussion that was outside the scope permitted under § 54956.8 and (b) inaccurately noticing the closed session hearing in violation of § 54954.2(a). *See Shapiro*, 96 Cal. App. 4th at 924 (upholding finding of violation of § 54956.8 and § 54954.2(a) on strikingly similar facts). The twenty-four closed session meetings regarding the Project and related subjects appear to have involved, at the very least, “the collective acquisition and exchange of facts preliminary to the ultimate decision” regarding the sale of City-owned land to Google. *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, (1968) 263 Cal. App. 2d 47-48; *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal. App. 3d 231, 234 (upholding injunction against executive session meetings based on closed session meeting with prospective real estate contractors). The Act requires that any such discussions be open to the public and allow for the public’s participation.

DEMAND TO CEASE AND DESIST, CURE AND CORRECT

The Brown Act, at section 54960, provides that any interested person may “commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations,” “to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body.”

In order to avoid litigation to force the City into compliance, FAC and WPUSA demand that the City Council cease and desist from the practices set forth above, which impair the public’s ability to participate in its government. Namely, the City Council must acknowledge the Brown Act violations set forth above, and must agree unconditionally to refrain from the following practices in the future:

1. Failing to identify the topics to be discussed in closed session;
2. Discussing matters, including but not limited to the range of topics listed above relating to the Project, in closed session where no closed session exemption provides a basis for the closed session discussion;

Further, pursuant to Government Code section 54960.1, we demand that the City cure and correct “actions taken” in violation of the Brown Act -- namely, as defined in Government Code section 54952.6, any “collective decision made by a majority of the members of a legislative body” or any “collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision” at any of the twenty-four closed sessions noted above. To cure such violations, the City Council must discuss in open session, and properly describe in timely notices, all of the topics impermissibly discussed during the twenty-four closed session meetings so that the public may “monitor and provide input on the Board’s collective acquisition and exchange of facts.” *Page v. MiraCosta Cmty Coll. Dist.*, 180 Cal.App.4th 471, 505 (2009) (overturning trial court finding that alleged violation of Government Code section 54956 had been cured by mere reconsideration of issues impermissibly discussed in closed session). Moreover, to avoid committing further violations of the Brown Act, the City must cure the violations prior to taking any further actions for which unlawful closed-session deliberations and decision-making were preliminary, including any final action on the sale of the Property to Google.

As provided by Government Code section 54960.1, you have 30 days from the receipt of this demand to cure and/or correct the challenged action or inform us of your decision not to do so, and to unconditionally agree to refrain from engaging in such unlawful practices in the future. If you fail to cure or correct as demanded, or to cease and desist as demanded, such inaction may leave us no recourse but to seek a judicial invalidation of any invalid actions pursuant to Government Code section 54960.1, as well as declaratory and injunctive relief relating to the City Council’s apparent practice of failing

to identify the topics to be discussed in closed session and discussing matters in closed session where no closed session exemption provides justification for doing so. As you know, a plaintiff that prevails on a Brown Act claim is entitled to costs and attorney fees under Government Code section 54960.5.

Thank you for your prompt attention to these important matters.

Sincerely,

/s/ David Snyder
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cc: City Attorney Richard Doyle via fax at 408-998-3131
Enclosures