

**TOWN OF SAN ANSELMO  
STAFF REPORT  
January 21, 2014**

For the Meeting of January 28, 2014

TO: Town Council

FROM: Rob Epstein, Town Attorney  
Megan Acevedo, Deputy Town Attorney

SUBJECT: Discuss Options for Addressing Lack of Public Comment on Commission Appointments  
Agenda Item at November 12, 2013 Town Council Meeting

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**RECOMMENDATION**

That Council discuss the options for addressing the failure to call for public comment on an agenda item concerning commission appointments at the November 12, 2013, Town Council meeting.

**BACKGROUND**

At the December 10, 2013, Town Council meeting a resident raised a concern that the Town Council did not take public comment on an agenda item regarding commission appointments at its November 12, 2013, meeting. In response, the Council requested that Deputy Town Attorney, Megan Acevedo, review the audio recording of the November meeting to determine whether public comment was taken on the item and if necessary, to provide the Council with guidance on curing the failure to hold public comment. At the January 14, 2014, Town Council meeting, Ms. Acevedo provided a summary of her findings and at the conclusion of that presentation, the Council directed the Town Manager to agendize the issue for discussion at a future Council meeting.

Legal Background:

Under the Brown Act ("Act"), "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, that is within the subject matter jurisdiction of the legislative body..." (Gov. Code § 54954.3(a)). Courts have construed this to mean that for each agenda of a regular meeting, there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, as well as an opportunity for public comment on each specific agenda item as it is taken up by the body. (*Chaffee v. San Francisco Library Com.* (2004) 115 Cal. App. 4th 461, 469).

Where an alleged violation of the Act has occurred, the statute provides a remedy that allows a court to nullify past actions made in violation of the Act, but only for specific types of violations. (Gov. Code § 54960.1). Invalidation is available only for violations of the following sections of the Brown Act: section 54953 (basic open meeting provision); sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); and 54956 (special meetings). Violations of sections not listed above do not give rise to invalidation actions. (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal. App. 4th 471, 500, citing, *Bell v. Vista Unified*

*School Dist.* (2000) 82 Cal.App.4th 672, 684; see also *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1118).<sup>1</sup>

In addition, under the Brown Act an interested person can seek to prevent future violations of the Act. The statute provides that a person may commence "an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency ... ." (Gov. Code § 54960(a); *Galbiso v. Orosi Public Utility Dist.*, (2008) 167 Cal. App. 4th 1063, 1076).

## **ANALYSIS**

In this instance, the audio recording of the November 12, 2013, meeting confirms that the Council did not hold public comment on the item concerning commission appointments. Although failing to hold public comment on a single item at a particular meeting is arguably a violation of the Brown Act, it is not clear that it could give rise to a viable claim against the Town.

It is unlikely a court would nullify the action taken on November 12, 2013. Section 54954.3 is the provision of the Act that requires public comment; however, it is not one of the provisions listed in the Brown Act as being susceptible to a claim seeking to nullify the Council's past action (Gov. Code 54960.1). Nullification can only be sought under section 54960.1, which, as discussed above, is limited to the specific sections of the Brown Act listed in that section (i.e., 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5).

An interested person could attempt to bring an action against the Council to prevent future violations of the Brown Act by arguing that the Council's past failure to call for public comment indicates that the Council is likely to limit the public's ability to participate in future meetings (Gov. Code § 54960). Given that this was a single occurrence, it is unlikely that a court would grant such a remedy. Even if such an action were successful, it would not affect the commission appointments that were made in November. Rather, it would be a prospective remedy that would concern future Council meetings.

To address the lack of public comment on the November 12, 2013, commission appointment item, the Council could do one or more of the following:

1. Invite former Council members, Ford Greene, Tom McInerney and Kay Coleman, to provide an explanation about what occurred at the November 12, 2013, meeting from their perspectives;
2. Provide an opportunity for the public to speak on the commission appointment item at a future Town Council meeting;
3. Rescind the commission appointments made at the November 12, 2013, meeting and begin the appointment process again. This would entail interviewing candidates<sup>2</sup> for the Arts

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<sup>1</sup> Where an action falls under one of the specified categories, prior to commencing an invalidation claim the interested party must make a written demand of the legislative body to cure or correct the action. (Gov. Code § 54960.1(b).) The demand must be made within 90 days of the date the action was taken and the legislative body must cure or correct the challenged action within 30 days of receipt of the demand. (Gov. Code § 54960.1(c)).

<sup>2</sup> Town staff would have to determine whether all candidates are willing to be interviewed after having their initial appointment rescinded.

Commission, Planning Commission and Flood Committee and appointing them at a future meeting; or

4. Take no further action.

**Conclusion**

The Town Council should discuss the options for responding to this potential Brown Act violation and determine next steps.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Rob Epstein', with a long, sweeping horizontal line extending to the right.

Rob Epstein  
Town Attorney