

ROBERT L. BERRY

ATTORNEY AND COUNSELOR AT LAW

P.O. Box 4941, Chico, CA 95928

ROB@RLBERRYLAW.COM

Wednesday, September 15, 2021

Chico City Council Members
Chico City Attorney
Chico City Clerk
411 Main Street
Chico, CA 94928

Re: Cease and Desist-Violations of the Brown Act (“Act”)

Dear Mayor Coolidge, City Council Members, City Clerk and City Attorney:

Pursuant to Cal. Gov. Code §54960.2, this letter establishes our demand that the Chico City Council cease and desist from certain past actions, alleged specifically below, which violate provisions of Chapter 9 of the Brown Act, and subject to the remedies as provided by §95960.1 and §95960.2 et seq.

Allegations include the following violations:

1. Taking up items not appearing on the published agenda under §54953 et seq. and without proper notice under §54954.2,3;
2. Exceeding the scope of open meeting exceptions under §54956.9 by holding deliberations in excess of the limitation to “...confer with and seek advice of counsel.”
3. Acting as defined by §54952.6 on matters of public interest, outside the legitimate scope of §54956.9
4. Failure to publicly report actions taken in closed session as required by §54953(c)(1,2)

FACTUAL BACKGROUND

On April 6, 2021, during a Regular City Council Meeting, under the open agenda item 5.5, a minute order was passed by majority vote as follows:

“...to direct staff to stop working on the BMX shelter concept; revisit other uses of the DCBG funds, and rescind the Shelter Crisis Declaration.”

On June 8, 2021, the Chico City Council convened a Special Meeting. Prior to the public session, a closed session was held pursuant to §54956.9(a) regarding the Warren case No. 2:21-cv-00640. The closed session announcement was made as follows: “No reportable action was taken; direction was provided.” The only other item on the agenda was a cannabis tax matter, and allocation of ARP funding in the amount of over \$22 million. The final motion contained the language:

“Removal of the homeless reference from the BMX line item;”

On July 2, 2021, City Manager Mark Orme submitted a sworn Declaration in the Warren matter to the Eastern District Federal court. On Page 2, paragraph 5, Mr. Orme makes the following statement:

“On June 8, 2020, I presented two viable, publicly owned properties for consideration to the City of Chico City Council: a location at the Chico Municipal Airport (“Airport Location”), and a location at an old BMX track (“BMX Location”). At that meeting, the City Council instructed me to proceed with developing a temporary shelter site at the Airport Location and commence preparing the BMX Location for a shelter site.”

The Airport Location was in fact developed, at a considerable investment of staff resources and a reported cost of \$35,000 per month.

On September 7, 2021, during a Regular Chico City Council meeting, closed session item 7.2 listed the Warren matter pursuant to §54954.9(a). Report was confirmed by the City Clerk to be:

“No reportable action taken; direction was provided”

On Wednesday, September 10, Council member Sean Morgan appeared on a local radio show. In the course of his interview, he announced that the Airport Location was going to be shut down, and some of the fencing and other facilities were going to be transferred to Comanche Creek and that location would be fenced in “to protect the business” adjacent to Comanche. In addition, he announced that the transformation of the BMX location was to be accelerated, and the relocation of the current tenants was going to occur ahead of previous plans.

On September 13th, the City of Chico issued a press release, indicating that the “Temporary Resting Center” at the airport was in fact being closed, and “patrons will be expected to leave by Friday, September 17th.” No mention was made regarding either the BMX or Comanche Creek in this presser.

FIRST CAUSE OF ACTION: Violation of Cal. Gov. Code §54953 et seq. and §54954.2-.3 requirements for public meetings, notice and voting.

§54953(a) requires that “All meetings of the legislative body...shall be open and public...except as otherwise provided for in this chapter.” §54956.9(a) provides for an exception to this general rule for narrowly construed purposes related to existing litigation. That purpose is expressly defined as required to “confer with, or receive advice from, its legal counsel...” Any deliberation or action beyond the scope of that exception is required to conform with both the public meeting and appropriate notice requirements of §54953 et seq. and §54954.2.

Deliberations and actions must be held in public, and therefore the conduct of the council taken in closed session as described herein is a violation of §54954.3, as “no action shall be taken on any item not appearing on the agenda unless otherwise authorized.

SECOND CAUSE OF ACTION: Violation of Cal. Gov. Code §54956.9(a): Deliberations are not within the scope of closed meeting exceptions.

§54950 reads:

“In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly **and** that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” (emphasis added)

The Act makes a distinction between “deliberations” and “actions.” Deliberations involve the considerations of all sides of an issue, weighing information for or against any proposed action, and *discussion of the potential details or potential alternative methods of executing a decision to carry it out*. The deliberation of items which must be acted upon only in a public meeting is a critical part of the legislative process, and specifically required by the Act to be conducted in public. The closed session exemption of §54956.9 grants the City Council a very narrow¹ exception from the open meeting laws only to “confer with, or receive advice from, its legal counsel” –stopping far short of, for example, deliberations for moving forward with a new public works project or major commitments of personnel and public funds. To put a finer point on it, the council is entitled to receive the advice of legal counsel as to the potential consequences of alternative courses of action directly pertaining to pending litigation, but from there any further deliberations supportive of actually making a decision or commitment to that action must be done in a public meeting. From the record it is clear that deliberations supportive of actions required to be decided in a public meeting –i.e. the opening, closing, and allocating money and staff time to the projects outlined above-- must have improperly occurred in closed session, as there were no such deliberations (much less the decisions or commitments) in a public meeting.

THIRD CAUSE OF ACTION: Taking actions in closed session that violates the Act.

§54950 requires that actions be taken openly.

§54954 defines “action” thus:

¹ “For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated.” Government Code §54956.9(b).

“As used in this chapter, “action taken” means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.” (emphasis added)

Therefore, an actual vote is not required to constitute action, and actions must be taken in public. It should be noted that §54954 is written in the disjunctive so that “action taken” may be a collective decision, *or* a collective commitment, *or* promise, *or* an actual vote. (61 Ops.Cal.Atty.Gen. 283) The decisions to develop the airport site, expend public funds and staff time and effort, direct staff to develop the BMX site, despite an existing minute order specifically directing staff not to do so, closing the airport site, allocating resources to Comanche Creek from the Airport, accelerating the development of the BMX location, etc. are all the result of actions taken by the City Council. These actions were taken in closed session and should have properly been taken in public after public deliberations, and as such are null and void as being in direct violation of the Act.

FOURTH CAUSE OF ACTION: Failure to report out vote or actions taken in closed session violates Cal. Gov. Code §54953

§54953(c)(1) states:

“No legislative body shall take action by secret ballot, whether preliminary or final.”

§54953(c)(2) requires:

“The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.”

Even though the actions taken in closed session were inappropriate for closed session, it is clear that definitive actions were taken that were not reported despite the mandates of the Act. The public was left in the dark, while City staff secretly carried out the decisions and directives from the Council of which the public was unaware. The reports out after the Council closed sessions for “pending litigation” have consistently been “No reportable action was taken; direction was provided.” The repeated violations and failure to report the actions taken establish a deliberate pattern and practice of taking actions in closed sessions that are subsequently concealed from the public by failing to report them as required by the Act.

It is clear from the record that specific actions were taken in closed session, but none of these decisions were reported out to the public as required by the Act, and these are part of a pattern and practice of violations of the Act that requires remediation to prevent ongoing and future violations.

DEMANDS FOR RELIEF

1. Pursuant to §54960 and **§54960.1(a)**, we hereby **demand correction** that the following actions taken in closed session, as described herein, or as known by participating council members, be declared null and void: (a) the deployment and allocation of resources and infrastructure from the Airport homeless site to the Comanche Creek Greenway; (b)(i) the acceleration of use of the BMX site for homeless shelter by terminating the tenancy of the existing tenant for the BMX operation and evicting that tenant without having first relocated the tenant and BMX operation to a new location, and (b)(ii) that the City Council recognize the current ongoing validity of the minute order of April 6, 2021 and express direction to City staff “to stop working on the BMX Shelter concept” (without prejudice to any future review or action by Council pursuant to valid notice and action in a public meeting).
2. Pursuant to §54960 and **§54960.2**, we hereby demand that the City of Chico and the Chico City Council unconditionally commit to **cease and desist**, based on the facts presented herein, and the knowledge by Chico City Council members of any other facts relevant to these allegations, from: the pattern and practice, ongoing actions, and threatened future actions in violation of §54956.9 [closed sessions for “pending litigation”] as described herein, and to cure and correct the pattern and practice of deliberating and acting in non-public meetings as described in this letter and defined by the Act.
3. Pursuant to §54960(a),(b), we hereby demand that the legislative body, Chico City Council, audio record closed sessions and preserve the audio recordings as provided by the Act.
4. We demand a response pursuant to §54960.1 and §54960.2. of the Act.

Respectfully and sincerely yours,



Robert Berry
Attorney-Chico Stewards of Parks and Waterways