City of Anaheim
OFFICE OF THE CITY ATTORNEY

May 3, 2019

Brendan Hamme, Esq.
ACLU of Southern California
1851 E. First Street, Suite 450
Santa Ana, CA 92705

Re: Correspondence dated April 16, 2018

Dear Mr. Hamme:

I am writing in regard to your April 16, 2019 letter to the members of the Anaheim City Council. In that correspondence, you raise several challenges to the procedural rules and practices of the Anaheim City Council. The City's response is set forth below.

Public Comment Limits

Your first assertion is that the City's allotment of three minutes for non-public hearing agenda items violates the Brown Act. You cite to a California Attorney General opinion (75 Ops.Cal.Atty.Gen 89) for the proposition that a standardized public comment time limit is a *per se* Brown Act violation because it does not take into account the particular circumstances of each meeting. In actuality, that AG opinion supports the City's right to impose time limits, noting, among other things, that: 1) a legislative body has wide discretion to adopt rules governing the conduct of its proceedings, including the time limits for public testimony; 2) a court will not substitute its judgment as to the propriety of those rules absent "convincing evidence of fraud, arbitrary action or an abuse of discretion"; and 3) the legislative body has both a need and a right to control the time allotted to particular items in order to prohibit certain matters from "monopoliz[ing] the time necessary for the body to consider all agenda items." This opinion is consistent with the well-established body of law holding that limitations on public comment are not only specifically provided for in the Brown Act, but constitute lawful time, place and manner restrictions given the legislative body's need to conduct governmental business at its meetings. *See, e.g., Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 174-76 and *White v City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425 (recognizing the importance of placing time limits on speakers so that legislative business can be accomplished).

In contending otherwise, you appear to be relying on the notation in the AG opinion that the reasonable time for public comment will vary as the facts and

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circumstances vary. However, this too supports the imposition of limits on public comment in Anaheim. The facts and circumstances here are that we consistently and predictably have hours of public comment, with the meetings often stretching late into the evening or into the next day. Members of the public must wait hours for items on the agenda to be heard, particularly public hearing items or items that are not on the consent calendar. Council members are often deciding important issues late at night and/or long after the meeting has commenced. Under these circumstances, we believe the three minute public comment period is reasonable, particularly given that the limit can be (and has been) extended if the circumstances warrant it.

As you probably know, standardized public comment periods (with the body having a right to extend or limit comments) are fairly common, particularly in larger agencies that have long agendas and routinely have extended periods of public comment. In addition, three minutes is a fairly typical time limit in California, and one that has been upheld by the courts. *Ribakoff v. City of Long Beach, supra,* 27 Cal.App.5th at 174-76 (upholding three minute limit on public comment[1]); *see also, Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266, 271 (three minute limit does not run afoul of the First Amendment).

The Structure of Public Comments

Your letter next contends that individuals must be permitted to speak on each agenda item as it is called, as well as given a separate opportunity to speak on general matters within the subject matter jurisdiction of the City Council. However, that is not consistent with the opinions cited above, nor is it consistent with what Government Code § 54954.3 actually says. Section 54954.3(a) provides that every agenda shall provide "an opportunity for members of the public to 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…" Anaheim's rules allow the public to address the Council on agenda items during the public comment period *before* agenda items are discussed, which is not only a common rule/procedure, but complies with the plain language of Section 54954.3(a). Moreover, individuals who wish to speak solely on items not on the agenda are provided with a separate public comment period for this purpose. If the City were to adopt the procedure you suggest (allowing individuals to speak on each item of business as it is called, plus make general public comments), it would be difficult, if not impossible, for the Council to conduct City business in a reasonably expeditious and orderly fashion.

[1] The *Ribakoff* court upheld a Long Beach "speech code" substantially similar to Anaheim's, which provided that "Comments shall be limited to three minutes for all comments, unless different time limits are set by the Chairperson, subject to the approval of the Board." *Id.* at 164.

Your letter cites dicta in *Chaffe v. San Francisco Library Comm'n* (2004) 115 Cal.App. 4th 461, 469 (which was essentially repeated without analysis in *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063[2]) to support the procedure you propose. *Chaffe* analyzed the issue of whether general public comment was statutorily required at every meeting held by a legislative body, rather than for every agenda posted by that body. The court held that a general public comment period was required for every agenda (not every meeting), and that providing that opportunity on the second day of a continued meeting complied with the Brown Act. The court did purport to summarize Government Code § 54954.3 (a), stating that general public comment, as well as comment on "each agenda item as it is taken up by the body" is required, however, as noted above, that is dicta, is expressly contrary to what the statute actually says, and is contrary to the decisions cited above upholding limits on public comment.[3]

Access to a Microphone

Your letter further contends that the Brown Act was violated on a specific occasion when a speaker's microphone was turned off. The City is not aware of any case law that holds that a speaker has a First Amendment right to amplified sound. More importantly, the switching off of the speaker's microphone was brief, he could still be clearly heard, and this did this did not halt or impede the speaker's comments. In short, this one-time occurrence did not prevent the speaker from making his comments, and does not constitute the type of concrete and particularized injury that is generally afforded constitutional protection. *Newdow v. Rio Linda Union School Dist.* (9th Cir 2010) 507 F.3d 1007, 1017. This is particularly true given that the speaker routinely appears at Council meetings unimpeded and, contrary to the implications in your letter, is regularly allowed to make statements that are critical, profane, racist, sexist, misogynistic and/or homophobic.

Expressive Conduct

Your next contention is that the City prohibits expressive conduct, such as clapping, heckling, booing and interrupting other speakers. While the City requests that members of the public abide by standards of decorum so that all individuals have an opportunity to speak and participate in meetings without intimidation or interference, it does not "punish" individuals for expressive conduct as your letter suggests. The City is well aware that it may only restrict speech that actually disrupts a meeting, *White, supra*, 900 F.2d at 1425-26. While things such as clapping, heckling and interrupting speakers can disrupt a meeting, no one has been removed for

[2] *Galbiso* addressed the issue of whether individuals are entitled to comment on closed session items on the agenda, which the plaintiff in that case had been prevented from doing. Neither the length of the public comment period, nor the number of times an individual was entitled to speak, were at issue in the decision.

[3] It is also contrary to the practices of agencies similar to Anaheim. For example, Santa Ana and Newport Beach have a three minute public comment limit. Los Angeles allows speakers three minutes for public comments on agenda items and an additional minute for general comments. All of the agencies, including Anaheim, allow for separate comments on public hearing items as those hearings are called.

these activities, and the City's rules and practices comply with the First Amendment standards that apply to disruptive speech. *See,* Anaheim Municipal Code section 1.12.017 and Section 1.07 of the City's Procedures and Rules of Order for Council meetings ('[a]ny person who makes disruptive remarks, or engages in any conduct which disrupts, disturbs or impedes the orderly conduct of any Council meeting, shall, at the discretion of the presiding officer or a majority of the City Council, be barred from further addressing the Council during that meeting and/or removed from the meeting room in accordance with the procedure set forth in Section 1.12.017 of the Anaheim Municipal Code, or any successor provision thereto.")

Speaker Cards

The City does not require that speaker cards be submitted at any particular time as your letter contends. While this was a proposed amendment to the Procedural Rules, it is not one that the Council adopted.

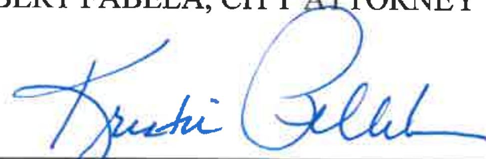
Council Member Comments

The last section of your letter addresses an exchange between Mayor Sidhu and Council Member Faessel that occurred during a time that the Council Members were unclear what motion they were voting on, and Mayor Sidhu was attempting to provide guidance in this regard. Moreover, even assuming arguendo that Mayor Sidhu was trying to influence Council Member Faessel's vote on an item, doing so is not unlawful. In fact, this is a routine occurrence at Council meetings and is the very reason for Council debate.

Finally, your letter takes issue with proposed restrictions on the length of Council debate. Again, such restrictions are common and are lawful as long as they are reasonable. In addition, they have not been adopted by the Council, so any challenge to them is premature.

Sincerely,

ROBERT FABELA, CITY ATTORNEY



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