

July 27, 2021

Chairman Andrew Do and Members of the Board of Supervisors  
Orange County Hall of Administration  
333 West Santa Ana Blvd  
Santa Ana, CA 92701

Re: Buck Johns adv. County of Orange

Dear Chairman Do and Members of the Board:

This letter is to call your attention to multiple Brown Act violations that occurred during the Orange County Board of Supervisor's meeting on July 13, 2021.

It appears that during this meeting, the Board voted on action regarding pending litigation threatened by Mr. Buck Johns regarding parcel APN 439-051-14. Mr. Johns' attorney had demanded that the illegal fence he had erected surrounding this public property be allowed to stay or he would initiate litigation. In a letter addressed to Mr. Johns on July 14, 2021, OC Chief Real Estate Officer Thomas Miller states that "county staff has had the opportunity to discuss the Subject Property with the Board of Supervisors and has received direction with regard to this matter." Since this is a decision by the Board of Supervisors, one must conclude that this was discussed during the July 13, 2021 board meeting, although nothing is stated regarding this on the agenda.

Working on the assumption that this was discussed by the Board (since making a decision that is NOT discussed at a Board meeting is a major violation of the Brown Act), the only item on the agenda that might refer to this is item SCS6, "CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION - SIGNIFICANT EXPOSURE TO LITIGATION pursuant to Government Code section 54956.9(d)(2). Number of Cases: One Case." County Counsel may have mistakenly assumed that notice, which provides no indication of what anticipated litigation might be discussed, complied with the "safe harbor" provisions of Govt Code Sec. 54954.5(c). It does not.

Assuming that this was regarding the Buck Johns threat of litigation, the correct code would have been Govt Code section 54956.9(d)(2)(e)(5). As Govt Code Sec. 54954.5(c) explains, the safe harbor description in that case requires additional information, and as the California Court of Appeals has recently decided, it requires the letter threatening litigation to be included in the agenda packet posted for public review.

Govt Code section 54956.9(e)(5) describes a subclass of anticipated litigation defined in pertinent part as:

“(5) A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, **which record shall be available for public inspection pursuant to Section 54957.5.**” [emphasis added]

We refer the county to [Fowler v. City of Lafayette, 46 Cal. App. 5th 360](#), which includes an extensive discussion of closed sessions addressing threatened litigation. According to *Fowler v. City of Lafayette*:

“On its face, section 54956.9, subdivision (e)(2) appears to apply to events that might themselves give rise to litigation, such as "an accident" or "disaster," or a "transactional occurrence that might result in litigation." But even assuming this language could be stretched to include a threat of litigation based on a pending application, we must bear in mind the well-established rule of statutory construction that "[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (Miller v. Superior Court (1999) 21 Cal.4th 883, 895 [89 Cal.Rptr.2d 834, 986 P.2d 170]; accord, Elliott v. Workers' Comp. Appeals Bd. (2010) 182 Cal.App.4th 355, 365 [105 Cal.Rptr.3d 760].) Subdivision (e)(5) of section 54956.9 specifically addresses a public agency's obligations when a person has threatened litigation outside a public meeting.”

In other words, the general provision cannot be used if a more specific code provision exists. Clearly, the correct code section is (e)(5), but this is not what was used for the closed session. *Fowler v. City of Lafayette* goes on to address the need to make the record of the statement threatening litigation available for public inspection. The court found [emphasis added]:

“Where litigation has been threatened outside a public meeting, it may be discussed in closed session under section 54956.9, subdivision (e)(5) *only* if a record of the threat is

made before the meeting, which record must be made available for public inspection pursuant to section 54957.5. (§ 54956.9, subd. (e)(5).) The clear import of section 54957.5 is that agendas and other writings that the legislative body receives in connection with a meeting should be available to the public upon request. Mostly, these are documents relating to agenda items for the open session of the meeting (e.g., § 54957.5, subd. (b)(1)), but section 54956.9, subdivision (e)(5) requires the same for documented threats associated with an agenda item for the closed session as well. **The only reasonable inference is that a record of a litigation threat to be discussed in closed session must be included in the agenda packet made available upon request before a meeting.** (See [Citizens for a Green San Mateo v. San Mateo County Community College Dist. \(2014\) 226 Cal.App.4th 1572, 1596 & fn. 5 \[173 Cal.Rptr.3d 47\]](#) [§ 54957.5 requires agenda packet to be made available to the public].)”

“We reiterate that the Brown Act is intended to “facilitate public participation in all phases of local government decision making” ([Golightly v. Molina, supra, 229 Cal.App.4th at p. 1511](#)), and that we must construe it *liberally* to accomplish its purpose ([Olson, supra, 33 Cal.App.5th at p. 525](#)). Members of the public are entitled to rely on the agenda and packet made available upon request (see § 54957.5, subd. (a))”

The Board of Supervisors’ agenda packet for July 13, 2021, failed to provide the public with a copy of the letter threatening litigation that was be discussed in closed session, in violation of the Brown Act as construed by the California Court of Appeals in the *Fowler* decision, let alone disclose that a specific letter had even been received. The failure to provide proper notice in advance of a regularly scheduled meeting is a violation of Govt Code Sec. 54954.2.

The failure to provide any of the additional information required in this instance by Sec. 54954.5 prevents the County from claiming “substantial compliance” with the “safe harbor” noticing option.

Additionally, the Board is required to report the results of any vote or decision, including who voted for and against the decision. This did not occur, another violation of the Brown Act, in this case Sec. 54953(c).

Through these failures, the County deprived the public of its California Constitutional right ([Article I, Sec. 3](#)) to present views to the Board that may differ from those of the County Counsel with whom the Board was about to meet in private.

That seems particularly important in this case, since at a previous meeting the Board was presented with 1,321 signed paper petitions requesting Mr. Johns’ private fence be removed from public park land. The failure to properly agendize

the Board's discussion of the letter from Mr. Johns' attorney denied those petitioners their opportunity to respond to the letter prior to the Board making a decision about it.

It should be noted that a letter from one of us (Susan Skinner) regarding the threatened litigation was Emailed to the Clerk of the Board, County Counsel and individual supervisors 2 days prior to the Board of Supervisors meeting. This letter should have been included in the comments regarding this item but was not. Had the item been noticed properly, the letter would have been specifically identified as being associated with that agenda item and thus included in the board packet. Since the letter contained a rebuttal to Mr. Johns' legally ridiculous arguments, the outcome of the subsequent vote might have been different had this letter been included in the board deliberations.

Not only was the public denied their chance to comment, but the absence of a proper announcement deprived the press of an opportunity to properly cover an evolving story. Paragraph 11 of a [July 23, 2021, article](#) by Stu News article by reporter Sara Hall recounts this frustration:

"An added closed session item on the board's Tuesday agenda noted a conference with legal counsel regarding anticipated or significant exposure to litigation, but the county representatives did not disclose any information on whether the matter could possibly be related to the Upper Newport Bay property. *Stu News Newport* could not confirm what the anticipated litigation was related to prior to publication."

Note that ten days after the closed session the press could not verify if the "direction" from the Board referred to in Mr. Miller's July 14 letter was given at the July 13 closed session, let alone which Supervisors voted for or against giving him the direction he describes.

This is not the open government contemplated by the Brown Act and the California Constitution.

We therefore request that this action be considered void and this agenda item be reconsidered using the correct Govt Code subsections, that the letter threatening litigation be included in the agenda, that a safe harbor description of the item be included in the agenda and that a full report out of any vote taken occur at the end of the closed session.

As provided by Govt Code section 54960.1, you have 30 days from the receipt of this demand to cure and correct the challenged action or inform me of your decision not to do so.

We might add that this entire episode reeks of special privilege, which is another way of saying political corruption. We will be submitting a complaint about this issue to the Orange County Grand Jury and advise County Counsel to retain records regarding the potential sale to Mr. Johns and subsequent county actions.

Thank you,

Susan Skinner MD

2042 Port Provence Place, Newport Beach, CA 92660

James Mosher

2210 Private Road, Newport Beach, CA 92660

CC: Leon Page, County Council