

From: [Zac Bowling](#)
To: [CityCouncil-List](#); [City Clerk](#)
Subject: [EXTERNAL] Opposition to Agenda Item 10-C - 2024-3645
Date: Thursday, January 4, 2024 4:56:32 PM

Dear Mayor Ashcraft and City Council Members,

I am writing to express my opposition to Agenda Item 2024-3645, proposed by Councilmember Herrera Spencer, which seeks to reconsider the policy of excluding remote public participation for non-agenda public comment.

While I appreciate the importance of public participation in council meetings, it is crucial to recognize that the City Council must have the flexibility to manage its meetings effectively. The decision to require in-person comments for the non-agenda public comment section is a reasonable measure to maintain order and decorum in council proceedings, especially in light of past experiences with inappropriate and disruptive comments made via remote participation.

Moreover, the Brown Act and our own Sunshine Ordinance, while mandating public access to meetings, do not specify the mode of participation. The discretion to structure meetings, including the format of public comments, lies with the city council. This autonomy is essential for the council to ensure that meetings are conducted in an efficient, respectful, and orderly manner.

I urge the council to consider the broader implications of this decision. Allowing unrestricted remote participation, especially in a context where it has been previously abused, could lead to further disruptions, hindering the council's ability to conduct city business effectively.

Furthermore, I would like to address the assertions made by Paul Foreman in his complaint to the Open Government Commission. His claim that the exclusion of online non-agenda public comment violates the Brown Act and the Sunshine Ordinance is legally unsubstantiated. The Brown Act, while ensuring public access, does not strictly mandate the specific mode of public participation. The decision made by the city council to manage public comments in a certain way is within its legal discretion, especially when it serves the purpose of maintaining order and decorum. Therefore, Mr. Foreman's complaint can be viewed as lacking legal merit and could be considered frivolous. It overlooks the council's inherent authority to structure its meetings for efficiency and effectiveness, a crucial aspect of local governance.

Additionally, I was actively involved in lobbying for AB 2449 in 2022, which amended the Brown Act for the parts cited by Paul Forman. The initial intent of AB 2449 was to make remote participation, a necessity during the COVID-19 pandemic, a permanent option. However, subsequent revisions of the bill, while maintaining the framework for remote participation, left the discretion of its application to smaller cities like Alameda, post the emergency order, and only left remote participation mandatory for the largest cities in California. This legislative history underscores that the decision to limit or allow remote participation lies within the jurisdiction of the City Council, not as a mandated requirement, but as an option to be exercised at their discretion. There is nothing in AB 2449, the rest of the Brown Act, or our own Sunshine Ordinance that doesn't allow the city to have different rules for participation for different types of items on the agenda.

In conclusion, I strongly recommend upholding the current policy of excluding remote public comments for non-agenda items. This approach balances the need for public input with the necessity of maintaining a constructive and respectful environment in council meetings.

Thank you for considering my perspective on this matter.

Sincerely,

Zac Bowling

From: ps4man@comcast.net
To: [Marilyn Ezzy Ashcraft](#); [Tony Daysog](#); [Malia Vella](#); [Trish Spencer](#); [Tracy Jensen](#)
Cc: [Manager Manager](#); [City Clerk](#); [Yibin Shen](#)
Subject: [EXTERNAL] Item 10-C City council Meeting Agenda of Jan. 2, 2024-Spencer Referral
Date: Monday, January 1, 2024 1:53:22 PM
Attachments: [OGCZoomComplaint.pdf](#)

Dear Mayor Ashcraft, Vice Mayor Daysog & Council Members Vella, Spencer and Jensen:

As you may be aware, I have filed a complaint with the Open Government Commission asserting that excluding online non-agenda public comment from your meetings violates the Brown Act and our Sunshine Ordinance. In addition, my complaint asserts that the public comment process was unlawfully modified by the agenda setter committee. Any modification must be accomplished by your majority vote at a duly noticed public City Council meeting. My complaint is scheduled for hearing on Jan. 29.

I am attaching a copy of the complaint so that you may understand my position. In my view, the law allows you only two choices, either to restore the right to online non-agenda public comment or to discontinue your current hybrid policy of allowing Zoom interactive online participation in Council meetings and return to allowing in person participation only.

The City Attorney has asserted to me that he disagrees with my position above and believes that you may lawfully exclude online non-agenda public comment. I believe that the exclusion, even if arguably within your discretion, is bad policy for the following reasons:

1. It selectively limits public comment for the only part of a City Council meeting which allows the public to raise issues that are not being raised by you or staff.
2. It penalizes the many conscientious members of the public for the misdeeds of a few who abuse the process with their hateful and divisive comments.
3. It uses the draconian remedy of exclusion when a remedy already exists to deal with these hateful and divisive comments in the language contained in your non-agenda public comment agendas that, "Speakers may address the Council in regard to any matter over which the Council has jurisdiction or of which it may take cognizance that is not on the agenda" This statement should be verbally announced by the Mayor prior to each public non-agenda session with advice that the Mayor will cut off any speaker who violates the rule.
4. It selectively cuts off online public comment in the part of the meeting that, due to the 15 minute limit, is the easiest to police as opposed to agenda public comment that has no overall time limit. Although the non-agenda comments that exceed the 15 minute limit can be made just prior to the end of meeting with no overall time limit, this rarely happens and, if it does, very few people remain in the audience to hear it.

I urge you to restore online non-agenda public comment. As stated above, you also have the option of discontinuing hybrid meetings and returning to the in person model at least temporarily, while the current international crises that is producing these hateful and divisive comments passes. However, the better choice is to allow full public comment, but with clear and consistent disallowance of comment outside of your subject matter jurisdiction.

Thank you for considering the above. I wish both you and staff a very happy and productive New Year.

Paul Foreman

DESCRIPTION OF ALLEGED VIOLATIONS

Statement of Facts

1. The posted agenda for the Nov. 21, 2023, regular City Council meeting stated at item 4 the following: "Oral Communications, Non-Agenda (Public Comment) - Limited to 15 minutes, in-person comments only, remote public comment not available for this section...". Allowance of non-agenda public comment is mandated by both the Brown Act at Govt. Code 54953 and the Sunshine Ordinance at Sec. 2-91.15.
2. The Nov. 21 meeting was a hybrid meeting that provided access by in person attendance at City Hall and remote attendance via Zoom. The City Council has been meeting in this hybrid form since the Governor terminated the Covid emergency on Feb. 27, 2023. At all of the City Council meetings from that date and until the November 21 meeting both in person and Zoom attendees were allowed to make public comments during the non-agenda portion of the meeting.
3. When Item 4 was reached at the Nov. 21, 2023, meeting, the Mayor, consistent with the agenda notice above, did not provide non-agenda comment from Zoom attendees. The published agendas for the December 5 City Council Meeting indicate that this will be a continuing policy.
4. Later in the said meeting, Council Member Spencer inquired as to how this change in policy had occurred, since the matter had never been submitted for consideration by the City Council. The City Clerk explained that the change had been made by the "agenda setters", including herself, the City Manager, City Attorney, and Mayor.

First Statement of Violations

5. The Sunshine Ordinance contains no provisions allowing remote attendance and participation at City Council meetings. However, Section 2-91.3 provides that:

"All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply."

6. The Brown Act at Govt. Code Sec. 54953 (b) allows cities to have a meeting by phone conference call if it meets listed requirements, including, posting agendas at all teleconference locations that identify each teleconference site which must be accessible to the public. Sec. 54953 (b) (3).
7. Section 54953 has been amended by the addition of Subsection (f), effective Jan. 1, 2023, to provide that a city, "...may use teleconferencing without complying with paragraph (3) of subdivision (b) if, during the teleconference meeting, at least a quorum of the members of the legislative body participates in person from a singular physical location clearly identified on the agenda, which location shall be open to the public and situated within the boundaries of the territory over which the local agency exercises jurisdiction..." if it complies with listed requirements including the use of a two-way audiovisual platform or a two-way telephonic service and a live webcasting of the meeting.
8. Both Subsections (b) and (f) contain the following language at Subsections (b) (2) (D) and (f) (1) (C):

“The agenda shall identify and include an opportunity for all persons to attend and address the legislative body directly pursuant to Section 54954.3.”

Subsection (f) (1) (C) adds to the end of the above quoted sentence, “via a call-in option, via an internet-based service option, and at the in-person location of the meeting.” No such language appears in (b) (2) (D) as Subsection (b) only provides one form of media, a telephone conference, and does not anticipate an in person meeting.

9. Under either subsection (b) (2) (D) or (f) (1) (C) the City must allow remote attendees to directly communicate their comments to the City Council through whichever media is utilized by the City. **The failure to do so violates the express provisions of the Brown Act.**

10. In a November 30 to Dec. 4, 2023, thread of emails between this complainant and the City Attorney he admits that if the Nov. 21 meeting was held pursuant to Subsection (f) the City cannot exclude remote public comment on any agenda item, but wrongly asserts that Subsection (b) does not prohibit such exclusion and that the Nov. 21 was convened pursuant to Subsection (b) rather than Subsection (f), stating as follows:

“However, to be clear the November 21 Council Meeting was not held pursuant to Subsection (f). Section 54953(f) applies only if the Council meeting occurred “without complying with paragraph (3) of subdivision (b).” As I am aware, the City did comply with 54953(b)(3), in that Council Member Vella posted the agenda at her remote location, permitted public participation (if any) from her remote location, and that the Council agenda identified her remote location on the first page: “Best Western Plus Dana Point Inn-by-the-Sea, 34744 Pacific Coast Highway, Dana Point, CA 92684.” This authorization/practice is consistent with longstanding Brown Act guidance.”

(City Attorney Email of 4:23 p.m. on Nov. 30, 2023, The full thread will be submitted to the Commission as an exhibit to this Complaint.)

11. The City attorney’s position is in error. The inclusion of the requirements of subsection (b) (3) from a hybrid meeting does not preclude it from being subject to the requirements of Subsection (f) as it does not preclude such a notice, but just allows it to be omitted. Moreover, all that is posted in the agenda is Council Member Vella’s remote location. No invitation to participate from that site is included, nor was there any proof of posting at her remote site. Moreover, even if she had made such an offer and posting, it would have been a meaningless gesture, as Dana Point is 427 miles from Alameda with a driving time of over 7 hours! **Thus, if your Commission finds that the meeting was held pursuant to Sec. 54953(b), it clearly violated Subsection (b) (3), thus invalidating the entire meeting, and requiring corrective action.**

12. In the alternative, **the Nov. 21 meeting met all of the requirements of Subsection (f) other than the exclusion non-agenda public comment and would only require corrective action regarding that element.**

13. The above Subsections of Section 54953 of the Brown Act set forth in paragraphs 1 thru 12 result in greater or more expedited public access than the Sunshine Ordinance. Thus, pursuant to section 2-91.3 of the ordinance, quoted in paragraph 5 above, must be applied to this Complaint.

Second Statement of Violations

14. It is too settled to require citation that City policy must be set by City Council. The role of the City Manager, inter alia, is, *“To administer and execute policies and undertakings formulated by the Council.”* Charter Sec. 7-2 (A). The setting of rules for public comment at a City Council meeting is a policy decision. Indeed, the City Council has done this several times in recent years. Thus, the adoption of public comment rules by any city official other than a majority vote of City Council is in violation of the Charter.

15. The City Council’s enforcement of a policy that it never voted on or subjected to public comment prior to adoption thereof is contrary to the basic intent of both the Brown Act and the Sunshine Ordinance and thus violates both. The Brown Act states in its first section at Govt. Code Sec. 54950:

“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.”

The Sunshine Ordinance also speaks to this at Sec. 2-90.1:

“An informed public is essential to democracy. It is the goal of the ordinance codified in this article to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made, and easy and timely access to all public records.”