

April 4, 2014

Zach Cowan, City Attorney  
2180 Milvia Street 4th Floor  
Berkeley, CA 94704

**RE: Request for City Council to take Immediate Action to Cure  
Violations of the City Charter and Brown Act**

Dear City Attorney Cowan:

Our firm represents several residents of the City of Berkeley who believe that the City Council took at least two separate actions in violation of the City Charter and the Brown Act at its March 11, 2014 meeting. We write today to request that the City Council take immediate action to remedy these violations of the law.

The focus of our clients are two actions the Council took in connection with Agenda Item 16a at the March 11, 2014 City Council meeting. Item 16a, which was continued in part from the Council's February 25, 2014 meeting,<sup>1</sup> concerned the subject "Referendum Petition Regarding Redistricting Petition." Regarding the Referendum Petition, Item 16a informed the public that the Council was considering two alternative actions:

a) repeal of Ordinance 7,320-N.S. in its entirety.

—OR—

b) Adopt a Resolution 1) calling a Special Municipal Election to be consolidated with the June 3, 2014 Statewide Primary Election, 2) establishing polices and timelines for filing ballot measure arguments, and 3) submitting Ordinance No. 7,320-N.S. to a vote of the electors at the June 3, 2014 Special Municipal Election.

Instead of taking one of these two actions, the Council voted to approve two actions concerning Item 16a that were never publicly identified on the Council's agenda or in the report accompanying Item 16a. First, the Council voted to submit Ordinance No. 7,320-N.S. to a vote of the electors at a Special Municipal Election held on November 4, 2014. Second, the Council voted to authorize the hiring of outside counsel to file a lawsuit for the purpose of obtaining a judicial order directing the Redistricting plan approved by Ordinance 7,320-N.S. be used in conducting the November 4, 2014 City Council elections.

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<sup>1</sup> The City Clerk's report for Item 16a includes three "Recommendation[s]", the first being that the Council accept the Clerk's Certification of sufficiency for the Referendum Petition regarding Ordinance No. 7,320-N.S. The Council voted unanimously to accept the Clerk's Certification at the February 25, 2014 meeting, but continued the remaining portions of item 16a to March 11, 2014.

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The Council's actions violated both the Ralph M. Brown Act (Gov. Code, § 54950 et seq) and the City Charter.

*Brown Act Violation*

As you know, the Brown Act requires the Council to post, at least 72 hours prior to a regular meeting, an agenda containing a brief description of each item to be discussed or transacted at the meeting. (Gov. Code, § 54954.2(a).) Any item that may be subject to action by the Council must be identified on the agenda. The Council is not permitted to take action(s) that is not identified on the agenda, except in certain situations not relevant here. (See Gov. Code, § 54954.2(b).)

The Council's actions on Item 16a at the March 11, 2014 meeting thus violated the Brown Act because the Agenda did not identify either placement of the referendum on the November 2014 ballot or the hiring of outside counsel as potential actions by the Council. We therefore respectfully request that the Council take corrective action to cure these violations of the Brown Act. The Council's failure to take such corrective action could expose it to litigation and payment of the plaintiff's legal fees.

*Charter Violation*

Additionally, the Council's March 11, 2014 actions concerning Item 16a also violated Article XIV, Section 93 of the City Charter. Section 93 states that, upon receiving certification that a sufficient number of voters have signed a referendum petition concerning an ordinance:

*the [ordinance] shall thereupon be suspended from going into operation and it shall be the duty of the Council to reconsider such ordinance, and if the same be not entirely repealed, the council shall submit the ordinance, as is provided in Article XIII of the Charter, to the vote of the electors of the city, at the next occurring regular statewide or general or special municipal election providing no posting, publication or other legal deadline as set forth in the California Elections Code and Government Code, has expired at the time the City Clerk reports verification of the petition to the City Council, and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof.*

Here, the Clerk certified on February 3, 2014 that the referendum was signed by a sufficient number of voters to qualify for placement on the ballot. Under Section 93, the Council had a "duty" to either repeal Ordinance No. 7,320-N.S. in its entirety, or submit the ordinance to voters at the "next occurring" regular statewide or general or special municipal election. The "next occurring" statewide election at that time was the June 3, 2014 statewide primary election. Indeed, that is presumably why the City Clerk's report for Item 16a included a specific reference

April 4, 2014  
Page 3

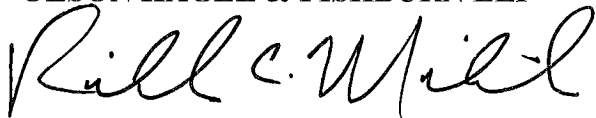
to placing the ordinance before voters at a June 3, 2014 Special Municipal Election to be consolidated with the statewide primary election. The Council's action on March 11, 2014 thus violated its ministerial duty regarding when the referendum must be presented to the City's voters.

We recognize that Section 93 includes a provision which appears to modify the requirement concerning the timing for submitting a referendum to the voters where a "posting, publication, or other legal deadline as set forth in the California Elections Code and Government[] has expired at the time the City Clerk reports verification of the petition to the City Council." Here, however, no such deadline had expired *at the time the City Clerk reported to the Council verification of the referendum petition*. The aforementioned provision does not, therefore, justify the Council's failure to present the referendum to the voters within the time prescribed by the Charter – i.e., on the June 3, 2014 ballot. Accordingly, we respectfully urge the Council to take corrective action to cure this Charter violation by either repealing Ordinance No. 7,320-N.S. in its entirety or calling a special municipal election as soon as possible for the purpose of presenting the referendum to the City's voters. The Council's failure to take corrective action on the Charter violation could expose the Council to litigation and attorney fees in addition to the exposure which exists by virtue of the Brown Act violations described above.

In sum, we believe that the Council's March 11, 2014 actions regarding Item 16a violated the Brown Act and the City Charter. As a result, we respectfully request that the Council immediately take corrective action to cure these violations of law. Should the Council fail to take such corrective action, we intend to initiate litigation to address these violations and, if successful, to request an award of attorney fees.

Very truly yours,

**OLSON HAGEL & FISHBURN LLP**



RICHARD C. MIADICH  
RCM:ab

cc: James Harrison, REMCHO, JOHANSEN & PURCELL, LLP