

Handouts - August 5, 2004
RTC meeting

August 8, 2004

From: Pat Spence

Addition/correction to minutes of the June 17, 2004, item 4 request that minutes reflect the oral comments that evening as follows:

Please add the bolded underlined to 4-20 top paragraph:

- Notice of Preparation responses, Mike Galizio, Development Review Director, Caltrans letter dated November 17, 2003.
 - 2) "The Draft EIR should include information about the proposed service schedule and frequency....."
 - 3.) **"The Draft EIR should include information about the associated operating and capital costs of the project of the proposed project as well as the project timeline. In addition the Draft EIR should include information about the estimated weekly/monthly ridership at each of the six proposed passenger platforms facilities....."**
 - 6) "Construction emissions should be controlled and mitigated. Non-Idling policy should be implemented at the passenger platform facilities....." (Question – Does this mean that the RDC locomotives should be turned off and then re-started after passenger boarding or de-boarding?)
 - 7) "Park-and-ride lots should be considered at all passenger platforms....."
- **Initial Study page 7-4 XVII Mandatory Findings**
"Would the Project:
 - "(b) Have impacts that are individually limited, but cumulative considerable? (cumulative means that the incremental effects of the project are considerably when viewed in connection with the effects of past projects, and the effects of probable future projects)?"**
 - c) Have environmental effects which will cause adverse effects on human beings, directly or indirectly?"**

June 23, 2004

Bob Lee
District Attorney
Santa Cruz County District Attorney's Office
701 Ocean Street, Room 200
Santa Cruz, CA 95061

Dear Mr. Lee,

I am asking you to investigate what appears to be a violation of The Brown Act by the Santa Cruz County Regional Transportation Commission (SCCRTC) on May 20, 2004, during their Closed Session.

I attended the June 17, 2004 SCCRTC meeting and raised the issue of their being in violation of The Brown Act based on the following:

- The May 20, 2004 minutes (see attached), page 6 state:
"SCCRTC consultant Kirk Trost, Miller, Owen & Trost, said the business plan was on schedule and that it would be discussed in Closed Session. County Counsel Rahn Garcia said he would discuss in Closed Session whether or not discussion of the business plan was appropriate for closed session."
- The Business Plan was not featured on the SCCRTC agenda for the Closed Session.

When I raised the question under Agenda Item #2 Oral Communications at the SCCRTC meeting on June 17, 2004 regarding the discussion of the Business Plan in the Closed Session, I was told by Chairperson Jan Beautz that during the Closed Session on May 20, 2004, the Commission discussed the "procedure" the Commission might use once they received the Business Plan. She said that they also discussed whether it was appropriate to be discussing the Business Plan in a Closed Session. She did not offer any further explanation regarding the Business Plan discussion that took place during the Closed Session.

County Counsel Rahn Garcia joined the meeting and told Chairperson Beautz that she was "not allowed to respond to a question raised at the time of Oral Communications," that she was "not allowed to act on or take action on a matter unless it is scheduled on the agenda," and for that reason the Chairperson should not be answering my questions. Chairperson Beautz then said that she couldn't further respond because what I was questioning was not an "action item" on the evening's agenda.

This seems peculiar to me. I was the Mayor of a California city for eight years and we routinely and respectfully responded to questions posed by the public during our meetings. Responding to a legitimate and timely question raised by the public during the Oral Communications section of a meeting is not an "action taken" on behalf of the legislative body. In fact, The Brown Act specifically states that "members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights..." (Please see attached The Ralph M. Brown Act: California Government Code Sections 54952.6, 54954.2, 54954.3.)

It is indeed curious that the Commission and the County Counsel would seek the protections of The Brown Act to avoid responding to a legitimate question raised during Oral Communications regarding their possible violations of The Brown Act.

It is now clear that the Business Plan was discussed in some form at the SCCRTC Closed Session on May 20, 2004 – in violation of The Brown Act. Whether the Commission was discussing the content of the Business Plan, elements of the Business Plan, or their plans and procedures for releasing the Business Plan to the public, this should have been done only in public in accordance with The Brown Act's legislative intent stated in Section 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."

Because of the manner in which this issue has been handled by the SCCRTC, I think it would be wise to determine whether there is a pattern of such behavior by this body in the conduct of their business. I look forward to hearing back from you the results of your investigation.

Thank you,

Marilyn O'Rourke

Attachments:

The Brown Act Pertinent Sections
5/20/04 SCCRTC Minutes – Page 6

cc
SCCRTC
Tom Honig, The Sentinel

Attachment to O'Rourke letter dated 6-23-04

Definition: "Action Taken"

54952.6. 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

Agenda Posting; Alternative Formats to Accommodate Disabilities; Action on Items Not on Agenda

54954.2. (a) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public. If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. The agenda shall include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.

No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that **members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities.** Furthermore, a member of a legislative body, or the body itself, subject to rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.

Spectators' Opportunity to Address the Body

54954.3. (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly 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, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2.

Attachment to O'Rourke letter dated 6-23-04

TPW Minutes 5/20/04 Page 6

Commissioner Wormhoudt moved to approve the staff recommendations that the Regional Transportation Commission authorize using the Santa Cruz Brach Rail Line Acquisition

Federal Earmark funds for the completion of the Phase II Environmental Site Assessment.

Commissioner Kennedy seconded.

Neil McElwee asked how the Commission could move forward without first obtaining the right-of-way and making sure the business plan wasn't full of holes.

Commissioner Beautz said the business plan was late and asked if discussion of the business plan was a closed session item

SCCRTC consultant Kirk Trost, Miller, Owen & Trost, said the business plan was on schedule and that it would be discussed in Closed Session. County Counsel Rahn Garcia said he would discuss in Closed Session whether or not discussion of the business plan was appropriate for closed session.



June 28, 2004

Morgan Taylor
Office of the District Attorney
Santa Cruz County District Attorney's Office
701 Ocean Street, Room 200
Santa Cruz, CA 95061

Dear Mr. Taylor,

Thank you for your telephone call of today and for your interest in pursuing this issue. I have attached the following documents to this letter:

- June 23, 2004 – letter from Rahn Garcia to O'Rourke.
- June 25, 2004 – O'Rourke response to Mr. Garcia.
- May 20, 2004 SCCRTC Agenda.
- May 20, 2004 SCCRTC meeting Minutes.

Please note that the Agenda for the May 20, 2004 Closed Session lists only one item: Conference with Real Property Negotiator. There is no mention of any discussion relating to The Business Plan also being a Closed Session item. I refer you to The Brown Act:

"54954.2. (a) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session...No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3."

Please note that while the minutes of the May 20, 2004 meeting reflect (on Page 6) that County Counsel Rahn Garcia and Kirk Trost intended to discuss the Business Plan in Closed Session, that item not only did not appear on the posted agenda, there is no subsequent public reporting of the discussion, nor of the decision(s) made, in the minutes of that meeting in item #11 - Closed Session – or item #12 – Open Session. I refer you to The Brown Act:

"Public Reports of Action Taken in Closed Session

54957.1. (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon..."

The May 20, 2004 minutes state: "County Counsel Rahn Garcia said he would discuss in Closed Session whether or not discussion of the business plan was appropriate for closed session." Clearly, some sort of decision was reached in this regard at the Closed Session – either to discuss it or not, and either to release the Business Plan to the public or not. And that decision was not properly reported to the public.

In sum:

- The Business Plan was not properly noticed as a Closed Session Agenda item.
- It certainly appears that the Business Plan was discussed in Closed Session.
- There was no reporting of the decision(s) made in Closed Session about the Business Plan.
- The Business Plan never should have been brought to the Closed Session.

Again, thank you for your attention to this matter. I look forward to hearing back from you in this regard.

Sincerely,

Marilyn O'Rourke

Attachments noted above

June 25, 2004

Rahn Garcia
Chief Assistant County Counsel
County of Santa Cruz
701 Ocean Street, Suite 505
Santa Cruz, CA 95060-4068

RE: RESPONSE TO YOUR LETTER OF JUNE 23, 2004

Dear Mr. Garcia,

Thank you for your letter of June 23, 2004; however it is non-responsive to the issue I raised at the SCCRTC June 17, 2004 meeting regarding an apparent violation of The Brown Act by the Santa Cruz County Regional Transportation Commission.

Please see attached correspondence sent to Bob Lee, Santa Cruz County District Attorney on June 23, 2004 and copied to the SCCRTC.

Your second paragraph on page two of your June 23, 2004 letter does raise another important issue. You say that "*Consequently, the right to obtain records under the (The Public Records) ACT would not include documents subject to attorney-client privilege, such as those written communications from counsel considered in a closed session authorized under the Brown Act.*"

Since it now seems apparent, based on the minutes of the May 20, 2004 meeting as well as Commissioner Beautz's responses to my questions at the June 17, 2004 meeting, that the Business Plan was, in fact, discussed during the May 20, 2004 Closed Session – in violation of The Brown Act – the details of that discussion, any written materials presented, and any decisions made in that Closed Session must immediately be made public.

I look forward to receiving that information from you.

Sincerely,

Marilyn O'Rourke

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Cc: Santa Cruz County Regional Transportation Commission
Bob Lee, Santa Cruz County District Attorney
Tom Honig, The Sentinel

Attachments:

June 23, 2004 Correspondence to District Attorney Bob Lee
May 20, 2004 SCCRTC Minutes Page 6
The Brown Act Excerpts