



## CITIZENS FOR A SUSTAINABLE POINT MOLATE

June 17, 2010

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This letter is to call your attention to what I believe was a substantial violation of a central provision of the Ralph M. Brown Act, one which may jeopardize the finality of the action taken by the Richmond City Council on May 18, 2010 on items K-1 and K-2.

The nature of the violation is as follows: In its meeting of May 18, 2010 the Richmond City Council took action to approve an amended motion comprising both an extension and change in provisions of the LDA between the City of Richmond and Upstream LLC, which was approved by formal vote. The amended motion differed materially from the originally agendized motion to extend in that

- 1) the original agendized item called for a 60 day extension to July 20, 2011 whereas the amended motion called for an 11 month extension to April 2011 without a fixed date in April 2011, and
- 2) it amended the terms of the LDA by adding provisions for authorizing staff to include an area in the LDA that would provide for the discussion, community outreach, and for policy work to prepare for all alternative projects to strengthen that discussion publicly and to bring forward into the LDA consideration of the alternative projects none of which were included in the originally agendized item K-1.
- 3) incorporated elements of the originally agendized item K-2 into the amended motion on item K-1, which item was voted on prior to hearing public input on item K-2

The agendized K-1 item to extend reads as follows:

*K-1. APPROVE an amendment to the Land Disposition Agreement between the City of Richmond and Upstream Point Molate LLC extending the closing date to and including July 20, 2010, continuing the monthly payments to the city in the amount of \$90,000, and DIRECT the city attorney to prepare and the city manager to execute an agreement consistent with this action - (Councilmember Bates 620-6581).*

The agendized K-2 item to consider alternate proposals reads as follows:

*K-2. DISCUSS the rights of the city to explore various development alternatives (apart from the Upstream proposal) for the Point Molate site and direct staff, in*





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*light of continuing controversy and legal complications that could well defeat the Upstream proposal or entangle the city in litigation for years to come, to receive ideas and suggestions for alternative plans so that the city may weigh the relative costs and benefits and responsibly rise from this economic downturn - Mayor's Office (Mayor McLaughlin 620-6503).*

The published agenda including items K-1 and K-2 for the Richmond City Council May 18, 2010 meeting is attached.

Prior to the public council meeting of May 18, 2010 at 6:30PM, a closed/executive session meeting occurred at 5PM, which closed session was agendized as follows:

*A-2. CONFERENCE WITH REAL PROPERTY NEGOTIATOR (Government Code Section 54956.8):*

*Property: Point Molate (site of former Naval Shipyard Depot)*

*Agency Negotiators: Bill Lindsay and Janet Schneider*

*Negotiating Party: Upstream Point Molate LLC*

*Under Negotiation: Price and Terms of Payment*

Just prior to items K-1 and K-2 were heard, there was discussion amongst city council members at the suggestion of Mayor McLaughlin to consider both items K-1 and K-2 together and to allow public speakers who had registered to speak on both items to do so but on the combined items with the proviso of being allotted 3 minutes to speak on both for those speakers who registered for both items. During the course of the discussion amongst city council about combining both items for consideration, Councilwoman Viramontes stated that *as a result of the discussions that took place during the closed session which occurred just prior to the public meeting, it was her preference to consider items K-1 and K-2 independently.* Mayor McLaughlin concurred and the items thence proceeded to be considered separately.

After hearing public speakers on the agendized item K-1, a motion to amend was made by Councilwoman Maria Viramontes in verbal form, which amended motion differed materially from the content and scope of the agendized item K-1 and which amended motion included elements of item K-2 prior to hearing public input on item K-2. The amended motion to K-1 is as follows:

*To amend the LDA to provide an extension until April 2011, and include all amendments that the Point Molate Committee has requested of the city manager that they pursue conclusion of all those negotiations, and request an amendment to the LDA authorizing staff to include an area in the LDA that would provide for the discussion, community outreach, and for policy work to prepare for all alternative projects to strengthen that discussion publicly and to bring forward into the LDA consideration of the alternative projects and as appropriate included in the California Environmental Quality Act (CEQA) document, when it does come forward eventually before the City Council, the amendment should complete monthly payments of \$90,000 and all other obligations that Upstream Point Molate LLC has.*





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The motion to amend contains material changes to the LDA which were not part of the original agendized item K-1, which did not include any material changes to the agreement itself outside of amending the extension date. Additionally the motion to amend called for an extension to the agreement of 11 months, not the 60 days published in the original K-1 item. The motion to amend item K-1 also included elements of originally agendized item K-2 regarding The motion to amend changes are significant enough impacting city land use policy that the public should have been appropriately noticed and provided an opportunity to evaluate the material changes and provide input.

Further, subsequent to the May 18, 2010 Richmond City Council meeting and the vote on items K-1 and K-2, an sixth amendment to the LDA between the City of Richmond and Upstream LLC was entered into on May 21, 2010 (attached) that provides for:

- 1) an extension until April 20, 2011
- 2) an increase in monthly payments from \$90,000 to \$115,000
- 3) a provision that will allow the developer to take over physical caretaking of the property in lieu of monthly payments
- 4) a provision for the developer to participate in community outreach workshops to solicit additional community input on alternative uses prior to the city's consideration of the final EIR/EIS for the tribal mixed use destination casino resort with the developer to fund \$50,000 to cover workshop facilitation costs
- 5) a provision for the city manager and developer to establish the procedures for the community outreach workshops to take place in three workshops and for the city manager and the developer to select the facilitator and economic analysis consultant
- 6) a provision for the workshops and associated work product to be completed within 180 days of May 21, 2010
- 7) a provision for the city to consider inclusion or reject inclusion of any of the alternate use proposals as part of the EIS/EIR for the tribal mixed use destination casino resort
- 8) a warranty that no event of default as of the date of the May 21, 2010 exists and that no event has occurred that with the passage of time or the giving of notice would constitute an event of default

Several of the provisions were of the sixth amendment to the LDA that was drafted subsequent to the May 18, 2010 Richmond city council meeting were neither noticed nor discussed publicly prior to entering into the sixth amendment.

It is clear that the content and scope of the amended motion to K-1 as presented by Councilwoman Viramontes had been prepared and memorialized to paper, as the offered amended motion to K-1 was read from a piece of paper by Councilwoman Viramontes.

And it would appear that the amended motion K-1 was developed as a result of exchanges that occurred and decisions made during the closed session that occurred just prior to the public city council meeting of May 18, 2010. During report call for closed session items in the May 18' 2010 city council meeting however, the





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city attorney advised that there was nothing to report regarding the closed session. We believe a collective concurrence was reached amongst the majority of city council prior to public hearing of both items K-1 and K-2. The amended motion to item K-1 was passed by a majority of four, and the identical four subsequently abstained as a majority to vote on item K-2.

The actions taken are not in compliance with the Brown Act because there was no adequate notice to the public on the posted agenda for the meeting that the matter as acted upon would be discussed, and there was no finding of fact made by the Richmond City Council that urgent action was necessary on a matter unforeseen at the time the agenda was posted. Additionally there was no public hearing on item K-2 before the amended motion to K-1 – which amended motion included provisions of item K-2 – was voted on and passed.

The Brown Act requires under section 54954.2, subdivision (a), the legislative body must 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,” *and no action or discussion shall be undertaken on any item not appearing on the posted agenda....* Shapiro v. San Diego City Council, supra, 96 Cal. App. 4th 904, 923. (Emphasis Added)

The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken. (See Roberts v. City of Palmdale (1993) 5 Cal.4<sup>th</sup> 363, 373, 375; Frazer v. Dixon Unified School Dist. (1993) 18 Cal.App.4th 781, 795-797; Stockton Newspaper, Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95, 100; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 45.) “The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’ [Citation.]” (Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234; see Roberts v. City of Palmdale, supra, 5 Cal.4th at p. 376.)

Section 54952.2, subdivision (b), of the Brown Act provides:

“Except as authorized pursuant to Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.”

As for the requirement that the e-mails be employed “to develop a collective concurrence as to action to be taken on an item,” as the Attorney General noted in opinion No. 00-906 of February 20, 2001 such actions would include any exchange of facts (see Roberts v. City of Palmdale, supra, 5 Cal.4th at pp. 375-376; Frazer v. Dixon Unified School Dist., supra, 18 Cal.App.4th at p. 796) or, substantive discussions “which advance or clarify a member’s understanding of an issue, or facilitate an





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agreement or compromise amongst members, or advance the ultimate resolution of an issue” (Cal. Dept. of Justice, The Brown Act, Open Meetings For Local Legislative Bodies (1994), p. 12) regarding an agenda item.

In the same opinion, the Attorney General found no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b). Application of the statute in such circumstances furthers the “broad policy of the act to ensure that local governing bodies deliberate in public.” (Roberts v. City of Palmdale, supra, 5 Cal.4th at p. 373; see Frazer v. Dixon Unified School Dist., supra, 18 Cal.App.4th at pp. 794-795; Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at p. 100; Sacramento Newspaper Guild v. Sacramento County Board of Suprs., supra, 263 Cal.App.3d at p. 45).

The Brown Act only provides for “closed sessions” or “executive sessions,” in the following circumstances: (1) to determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license;xliii (2) to with its negotiator to grant authority regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property;xliv (3) to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation;xlv (4) to meet with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, or a threat to the public's right of access to public services or public facilities;xlvi (5) to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee;xlvii (6) to meet with the local agency's designated representatives regarding the salaries, salary schedules, or fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.

Actions taken to amend the LDA and any other terms of condition of agreement between the City of Richmond and Upstream LLC that fall outside of 1) purchase price of the property 2) and terms of payment are not provided for under the Brown Act.

As you are aware, the Brown Act and its various amendments to date created specific agenda obligations for notifying the public of each item to be discussed or acted upon, and in accordance with section 54957.1(a)(1) requires the city to publicly report action taken in closed session that results in an approval of an agreement concluding real estate negotiations immediately if the closed session results in a final agreement, and upon inquiry if the agreement is finalized thereafter. Additionally amendments to the Brown Act of January 2009 amend the law to prohibit a majority of members of a legislative body to "use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."





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Further, if a legislative body takes action in violation of the Brown Act, the body must cure that violation by rescinding any such action and properly rescheduling the matter for action before the legislative body. Pursuant to Government Code Section 54960.1, I demand that the Richmond City Council cure and correct the illegally taken action as follows:

- 1) Nullify the vote on the amended motion to item K-1 and on item K-2 as taken on May 18, 2010
- 2) Rescind the sixth amendment to the LDA that was developed as a result of the vote taken on the amended motion to item K-1 on May 18, 2010
- 3) Issue a full report of the executive session of May 18, 2010 on item A-2
- 4) Provide any and all documents, transcripts, texts, notes, related to the action taken on the amended motion to K-1 on May 18, 2010, which shall also be made available to the public at the time of notice of the city council meeting as outlined in item 5 below.
- 5) Place and rehear items K-1 and K-2 as they originally appeared on the May 18<sup>th</sup> 2010 city council agenda on a subsequent city council agenda not to exceed 60 days from this demand and provide full notice
- 6) Require all city council members in attendance on May 18, 2010 to explain their positions and reasons for voting as they did on May 18, 2010 on the date of the city council meeting upon which the replaced items K-1 and items K-2 will be heard.

As provided by Section 54960.1 you have 30 days from the receipt of this demand to either cure or correct the challenged action or inform me of your decision not to do so. If you fail to cure or correct as demanded, such inaction may leave me no recourse but to seek a judicial invalidation of the challenged action pursuant to Section 54960.1, in which case I would seek the award of court costs and reasonable attorney fees pursuant to Section 54960.5.

In the event it appears to you that the conduct of the Richmond City Council specified herein did not amount to the taking of action, I call your attention to Section 54952.6, which defines "action taken" for the purposes of the Act expansively, i.e. as "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 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."

Respectfully yours,

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