



# Folsom City Council Staff Report

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| <b>MEETING DATE:</b>   | 5/10/2022   |
| <b>AGENDA SECTION:</b> | New Business  |
| <b>SUBJECT:</b>        | Consideration of Letter in Response to Demand Letter Received from Scott Rafferty Regarding Alleged Non-Compliance with the Brown Act |
| <b>FROM:</b>           | City Attorney's Office  |

## **RECOMMENDATION / CITY COUNCIL ACTION**

Staff recommends that the City Council consider and approve the attached reply to Scott Rafferty (Attachment 1) providing an unconditional commitment to continue to comply with the Brown Act.

## **BACKGROUND / ISSUE**

On April 20, 2022, the City received a cease and desist letter from Scott Rafferty (Attachment 2) alleging the following violations of the Brown Act on March 22, 2022:

1. The failure to permit public comment before the adoption of the consent agenda, which included the enactment of Ordinance No. 1324, as required by 54954.2(a) and 54953(a)(3);
2. The failure to recognize members of the public who raised their hands in accordance with previous instructions on how to comment prior to council action, as required by the same section; and
3. Multiple failures to announce in advance the “give notice of the means by which members of the public may access the meeting and offer public comment,” i.e., that there would be no ability to offer public comment, in violation of 54953(e)(2)(B).

While staff disagrees with the alleged non-compliance, the Brown Act provides a process for issues such as these to be resolved without further legal action. To that end, the Brown Act provides a prescribed form letter that the City Council may consider approving and sending in response to Mr. Rafferty's correspondence.

### **POLICY / RULE**

The Brown Act provides that a response to the cease and desist letter shall be in substantially the form provided in Government Code section 54960.2(c)(1). The fact that the City Council provides an unconditional commitment shall not be construed or admissible as evidence of violation of the Brown Act. Government Code section 54960.2(c)(4).

### **ANALYSIS**

Government Code section 54960.2 allows any interested person to submit a "cease and desist" letter to the City as a prerequisite to filing a lawsuit over alleged past non-compliance with the Brown Act. Pursuant to Section 54960.2(b), the City Council may respond to the "cease and desist" letter within thirty (30) days by providing an "unconditional commitment" not to repeat any or all of the actions challenged. By law, an "unconditional commitment" **does not** constitute admission of a violation, but it does bar a potential plaintiff from pursuing litigation and collecting attorneys' fees with respect to past non-compliance related to the specific action the City has "unconditionally committed" not to repeat.

The City Council's reply must be approved in open session as a separate item of business, not under the "Consent" portion of the agenda, and in substantially the form as prescribed by the Brown Act. Once approved, the Brown Act prohibits legal action by the potential plaintiff; however, if such an action is nonetheless filed, the court is required to dismiss the lawsuit with prejudice if it finds that the City Council has provided an unconditional commitment pursuant to the Brown Act.

### **FINANCIAL IMPACT**

There is no legal expense associated with this item as the City Council has always complied with the Brown Act. In addition, providing the attached reply may reduce the chance of litigation and any associated legal costs.

### **ENVIRONMENTAL REVIEW**

The California Environmental Quality Act (CEQA) does not apply to activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines §15061(c)(3)), or is otherwise not considered a project as defined by Public Resources Code §21065 and CEQA Guidelines §15060(c)(3) and §15378. The City Council's consideration of a reply to the Brown Act cease and desist letter meets the above criteria and is not subject to CEQA. No environmental review is required.

### **ATTACHMENTS**

1. Proposed reply from the City Council
2. Cease and desist letter dated April 20, 2022

Respectfully submitted,

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Steven Wang, City Attorney

## ATTACHMENT 1

May 11, 2022

Scott J. Rafferty  
1913 Whitecliff Court  
Walnut Creek, CA 94596

**Re: Brown Act Cease and Desist Letter**

To Mr. Rafferty:

The Folsom City Council has received your cease-and-desist letter dated April 20, 2022, alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

1. The failure to permit public comment before the adoption of the consent agenda, which included the enactment of Ordinance No. 1324, as required by 54954.2(a) and 54953(a)(3);
2. The failure to recognize members of the public who raised their hands in accordance with previous instructions on how to comment prior to council action, as required by the same section; and
3. Multiple failures to announce in advance the “give notice of the means by which members of the public may access the meeting and offer public comment,” i.e., that there would be no ability to offer public comment, in violation of 54953(e)(2)(B).

While the Folsom City Council strongly disputes and denies those allegations because the City has at all times complied with the Brown Act and hence there is no violation to cure or correct with respect to your demand, in order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the Folsom City Council hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.

The Folsom City Council may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment." You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment or may be mailed to an address that you have designated in writing.

Very truly yours,

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Kerri Howell, Mayor

ATTACHMENT 2

# SCOTT J. RAFFERTY

## ATTORNEY AT LAW

1913 WHITECLIFF COURT  
WALNUT CREEK CA 94596

(202)-380-5525  
RAFFERTY@GMAIL.COM

April 20, 2022

Ms. Christa Freemantle  
Clerk, City of Folsom  
50 E. Natoma Street  
Folsom CA 95630

by electronic and postal mail  
cc: Mayor Kerri Howell, members of  
the City Council, City Attorney

Dear Ms. Freemantle:

This letter constitutes a demand specified by Section<sup>1</sup> 54960.2(a)(1) that the City of Folsom cease and desist from violations of the Brown Act committed in connection with the public hearing the Council conducted on March 22, 2022. This letter also satisfies the requirement of Section 54960.2 and enables my clients to file an additional action to determine that the actions specified herein were taken in violation of the Brown Act. To the extent set forth herein, the City of Folsom may respond to the cease and desist demand by making an unconditional commitment to cease and desist from the challenged practices. This letter further constitutes a demand, pursuant to 54960.1(b) that the Council cure and correct the violation.

The violations are (1) the failure to permit public comment before the adoption of the consent agenda, which included the enactment of Ordinance No. 1324, as required by 54954.2(a) and 54953(a)(3); (2) the failure to recognize members of the public who raised their hands in accordance with previous instructions on how to comment prior to council action, as required by the same sections and (3) multiple failures to announce in advance the "give notice of the means by which members of the public may access the meeting and offer public comment," i.e., that there would be no ability to offer public comment, in violation of 54953(e)(2)(B)

On April 13, 2022, Mayor Kerri Howell signed an unconditional commitment to cease and desist from violations of 54953(e)(2)(B). My clients intend to enforce the violation of that commitment.

This letter demands that you, as City Clerk, announce that Ordinance No. 1324 is null and void.

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<sup>1</sup> "Section" refers to the Government Code, except as noted.



Thank you from your prompt action to recognize the invalidity of this action and to remove any reference or effect of the purported statute from the municipal code or other public records of the city.

Sincerely,

A handwritten signature in black ink that reads "Scott Rafferty". The signature is written in a cursive, slightly slanted style.

Scott J. Rafferty

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