



ANDREW JANZ
City Attorney

September 18, 2023

VIA E-MAIL asalceda@aclunc.org

Angelica Salceda
ACLU of Northern California
39 Drumm Street
San Francisco, California 94111

Re: Response by City of Fresno to Cease and Desist Letter

Dear Ms. Salceda:

This correspondence responds to your letter dated September 5, 2023, concerning “recent reports” that the Ad Hoc Budget Subcommittee (comprised of less than a quorum of city councilmembers) for the Fiscal Year 2023/24 budget is violating the Brown Act by not having public meetings as a standing committee.

As a threshold matter, your threats of litigation against the City of Fresno (City) are moot because the Ad Hoc Budget Subcommittee was dissolved on June 23, 2023, when the Fiscal Year 2023/24 City budget was approved by the City Council.

Additionally, the Ad Hoc Budget Subcommittee for the Fiscal Year 2023/24 budget was only in existence between January 19, 2023 until June 23, 2023 (less than six months). The primary authority that your letter relies on is California Attorney General Opinion No. 95-614 (June 10, 1996). However, the subcommittee that was at issue there did not have a limited term (unlike here where the Ad Hoc Budget Subcommittee for the Fiscal Year 2023/24 budget was in existence for less than six months).

The Fresno City Council approved the Fiscal Year 2023/24 City budget in open session at a city council meeting (after receiving public comments) on June 22, 2023, and the agenda package for that city council meeting was posted on the City’s website and made publicly available on June 16, 2023. Every budget-related hearing included public comment. Thus, there is no basis for your claims that the City lacked transparency in adopting the City budget.

While this dispute is moot and the Ad Hoc Budget Subcommittee has been dissolved, the City is also providing a response to your arguments that the Ad Hoc Budget Subcommittee, which is no longer in existence and lasted less than six months, allegedly violated the Brown Act.

Specifically, your letter contains no analysis about the Fresno City Charter. While you argue that other cities in California handle their budget subcommittees as standing committees, you have not considered that each charter city in California operates

differently based on the procedures established in their city charters (as approved by the voters of that city).

Under Fresno City Charter Section 400, subsections (d) and (f), the Mayor prepares the City budget and the City Council does not control the Mayor and the City Manager's decisions on how to prepare the budget. Unlike most cities, a council ad hoc subcommittee cannot direct the preparation of the budget because the Mayor and City Manager have the subject matter jurisdiction for budget preparation per the Fresno City Charter.

Additionally, under Fresno City Charter Section 400, the Mayor is in charge of directing the City Manager and not the City Council. Therefore, an Ad Hoc Budget Subcommittee (comprised of less than a quorum of city councilmembers) has no power to control how City staff prepares the City budget (unlike in most cities in California where a city council has the power to hire and fire a city manager).

Moreover, the legal authority cited in your letter is also distinguishable (as explained above) and there is authority that is more closely on point in this matter. For example, in *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, the trial court ruled that no Brown Act violation occurred because the ad hoc council subcommittee there did not have subject matter jurisdiction over the matter the ad hoc was reviewing. The trial court's ruling was affirmed by the Court of Appeal.

There, in September 2001, the Coastal Commission released for public comment a draft of one component of Malibu's eventual LCP, a Land Use Plan (LUP). In the months following, two of the five members of Malibu's City Council, Jennings and House, held a number of private meetings with various individuals, constituents, and city staff to "go over the City's response to the Coastal Commission's draft LUP." Jennings and House did not invite the general public to their meetings. At the Malibu City Council's regular session in December 2001, Jennings and House submitted to the City Council their recommendations on how Malibu should respond to the draft LUP.

The Court of Appeal held that Jennings and House did not meet as members of the City of Malibu's Land Use and Planning Committee. The Land Use and Planning Committee had jurisdiction over planning and zoning code enforcement. It did not, however, have jurisdiction over Malibu's response to the Coastal Commission's LUP for Malibu. The Malibu City Council had instead reserved to itself jurisdiction over the City's response to the commission's plans. (*Id.* at pp. 1127 – 1128) Additionally, the Court held that Jennings and House could not bind the Malibu City Council because the Council kept for itself all future decisions involving the LUP by placing the plan on its agenda as a permanent item until resolved. (*Id.* at pp. 1128 – 1129)

Here, the Fresno City Council does not have subject matter jurisdiction over the preparation of the City budget (as explained above) per the Fresno City Charter stating that function is controlled by the Mayor and not by the City Council. Thus, the same line of reasoning that the Court of Appeal applied in the *City of Malibu* case applies here.

Additionally, under Fresno Municipal Code Section 2-316, the Council President appoints special committees rather than the City Council as a whole. For example, in *Farron v.*

City and County of San Francisco (1989) 216 Cal.App.3d 1071, a lawsuit was filed against the City and County of San Francisco seeking a temporary restraining order to prevent a mayoral appointed task force from meeting in private, a declaration that the task force was subject to the open meeting requirements of the Brown Act and a writ of mandate compelling the task force to hold its meetings in public. The task force was formed by the mayor to formulate legislation creating permanent zoning controls regarding the demolition of single family houses, and it included two of the five members of the City's board of supervisors.

The Court of Appeal held that the task force was not a legislative body within the meaning of Government Code Section 54952. The Court found that there was no evidence that the members of the board of supervisors were appointed to the task force to represent the board's interests, the city's charter did not require board members to serve on the task force nor were there any bylaws of the task force requiring such participation, and there was no evidence that the board of supervisors required its members to serve on the task force or exercised any control over their actions.

Thus, the Court held that the members of the Board Of Supervisors did not serve on the task force in their official capacity. The Court also held that since the Mayor created the task force rather than the Board of Supervisors as a whole it was not a standing committee. (*Id.* at p. 1075)

Here, you claim that there is a potential dispute that could arise in the future concerning if the Fresno City Council President could decide to form or not form an Ad Hoc Budget Subcommittee for the Fiscal Year 2024/25 budget is premature and not ripe for judicial review.

The request at the end of your letter that the City provide assurances that any future Ad Hoc Budget Subcommittee will be a standing committee is a hypothetical situation that does not require a response under Government Code Section 54960.1. As explained above, cities can form Ad Hoc Subcommittees without being required to treat all Ad Hoc Subcommittees as standing committees.

In closing, there is no legal basis for requiring any further action be taken by the Fresno City Council concerning this matter for the reasons that are explained above.

If you have any questions, please let me know.

Sincerely,



ANDREW JANZ
City Attorney

c: Danielle Bergstrom, Fresnoland Media (danielle@fresnoland.org)
David Loy, First Amendment Coalition (dloy@firstamendmentcoalition.org)