

Sanders Political Law

1121 L Street, Suite 105, Sacramento, CA 95814

VIA EMAIL ONLY

Farimah Brown, Esq.
City Attorney, City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

RE: Request to Advise Against Adding Unfinished Business
Item to August 3, 2022 Special Meeting Agenda

Dear Ms. ^{Farimah} Brown:

On behalf of my client, Berkeley Rental Housing Coalition, we respectfully demand that the City Attorney's Office advise the Mayor, City Council and other City actors against adding the ballot measure amending the Rent Stabilization and Eviction for Good Cause Ordinance (the "Measure") to the August 3, 2022 special meeting agenda. As you know, the Measure became "Unfinished Business" under the Council's Rules of Procedure ("ROP") when it was not considered at the July 26, 2022 meeting, and we believe that Berkeley law compels the Council to comply with the requisite agenda processes required of Unfinished Business before proceeding further. The law and ROP set forth a regime which provides Berkeley voters with notice and an opportunity to provide input on matters of important public policy, such as the Measure, and – even though there is an arguable silence in the Mayor's and Council's authority to consider the Measure on August 3 – failure to comply with the Council's procedures violates Berkeley law and renders void these important public protections.

Factual Background

The City Council, using standard practices set forth in Berkeley law and the ROP, included an agenda item to place the Measure on the November 2022 ballot at its July 26, 2022 regular meeting. On July 26, the Council failed to consider the Measure prior to 11:00pm, and, as discussed in more detail below, the Measure therefore became "Unfinished Business" under the ROP.

A special meeting has been scheduled for August 3, 2022, and no agenda has yet been released for this meeting. In other words, only two days before the meeting, the public has no notice of whether the Measure will be discussed. At this time, we do not believe that the Measure has been set to appear on the August 3 special meeting agenda, though we believe that some officials are considering whether the Measure may be placed on that agenda.

Because the Council was scheduled to be on a break during the month of August, at least one City Councilmember has indicated that he will not be able to

attend the August 3 special meeting, and many Berkeley citizens probably do not understand that this special meeting may include important City business during a Council break.

Legal Issues

Berkeley law sets forth a strict procedure for the consideration of important City business by the Council, and the Council's ROP demonstrate that the Mayor and Council are dedicated to the importance of these procedures. The law and ROP are clear: the Council should not consider important City business without providing adequate notice to the public, providing the public with an opportunity to respond and considering all public input. Though the Mayor's and Council's authority to place items on a special meeting agenda is silent with respect to Unfinished Business, such silence should be considered only in the context of these laws and rules, and a failure to comply with the agenda requirements for Unfinished Business risks undermining Berkeley law by providing a complete exception to the City's agenda requirements.

As you know, Berkeley law required that the Measure be placed on the July 26 meeting agenda after consideration by the Council's Agenda Committee, and after the public was provided with notice at least 11 days in advance. (Berkeley Muni Code sections 2.06.060(A) & (C).) Given that the Measure is of great concern to Berkeley residents, this 11-day notice provides an important opportunity for the public to provide its input during a public meeting, and permits the voices of Berkeley voters to be heard and considered prior to the Measure being placed on the ballot. (See, Berkeley Muni Code section 2.06.010(C).) There may be important input that the Council has not yet considered, and amendments to the Measure may be necessary for a variety of reasons. (See, Berkeley Muni Code section 2.06.010(A).) Indeed, the ROP even include an entire five-page Appendix for writing agenda items meant "to prompt Authors to consider presenting items with as much relevant information and analysis as possible," so that the public can properly prepare input. (ROP, Appendix B.)

To further Berkeley's stated goal of providing the public with a true opportunity for participation in City matters, the ROP even make certain that the Council complete important City business before 11:00 P.M. at any regular meeting. (ROP, II(E).) In the event an agenda item is not considered prior to 11:00 P.M., that item becomes "Unfinished Business," and the ROP provides specific requirements for such items.

The rules state: "All Unfinished Business shall be referred to the Agenda & Rules Committee for scheduling for a Council meeting that occurs within 60 days from the date the item last appeared on a Council agenda. The 60 day period is tolled during a Council recess." (ROP, II(F) [emphasis added]; see also ROP, IV(A)(4) ["If any agendized business remains unfinished at 11:00 p.m. or the expiration of any extension after 11:00 p.m., it will be referred to the Agenda &

Rules Committee for scheduling pursuant to Chapter II, Section F”; emphasis added].)

Importantly, the ROP go so far as to prohibit the Clerk from accepting agenda items which have not followed these procedures, absent extraordinary Council action or legal requirements. (ROP, II(C)(3)(d).) Certainly, the Measure cannot be considered a “new” item, and the Clerk should therefore be bound by the requirements of the ROP with respect to Unfinished Business.

We understand that the ROP do not speak to the authority of the Mayor and Council to call for special meetings. (See, Berkeley Muni Code section 2.04.020.) However, the authority to call a special meeting does not speak to whether Unfinished Business can or should be brought back at a special meeting with two days of notice. (See also, Cal. Govt. Code section 54954.2(a) [Brown Act requires 72-hour notice for regular meeting agenda items].)

Indeed, the ROP as enacted develop the requirements set forth in Berkeley’s Open Government law, Berkeley Municipal Code chapter 2.06, the purpose of which is explicitly “to ensure that the public has an adequate opportunity to be informed of the City’s activities and to communicate its concerns to its elected and appointed officials.” (Berkeley Muni Code section 2.06.010(C).) At best, the authority to call a special meeting constitutes a silence in Berkeley law. More likely, the authority to call special meetings should be considered inapplicable to Unfinished Business or any other matters which are required by the law and/or ROP to proceed through the Open Government Law’s agenda processes.

Interpreting that silence to permit the Mayor or five Councilmembers to ignore the Unfinished Business agenda requirements renders the ROP useless, and permits officials to forever ignore those rules when it suits their agenda. This would be an especially harmful interpretation now, at a time when Council is scheduled to be on recess. At least one Councilmember will be on a pre-scheduled vacation and will therefore not be able to provide input on the Measure. Members of the public are also conditioned to understand that Council recess should mean that no matters of major public policy will be considered by the Council – at least not without adequate notice. Permitting the Measure to appear on the August 3 agenda deprives the public of its rights under Berkeley law, and renders the ROP’s Unfinished Business rules void.

My client of course reserves the right to challenge any Council action on the Measure in the event that the Council moves forward with consideration at the August 3, 2022 special meeting. However, we hope that this letter provides the City with the background necessary to follow its laws.

We hope that you can see that the placement of the Measure on the August 3, 2022 special meeting agenda is at best a violation of the spirit of numerous laws, and at worst constitutes a violation of such laws. We respectfully reiterate

our demand that you advise City officials that the Measure should not appear on the August 3, 2022 special meeting agenda, because the City's best interests are served by complying with the ROP's requirements for Unfinished Business.

Please feel free to contact me if you have any questions or concerns, or if I can provide further information regarding this matter.

Sincerely,



Nicholas L. Sanders

CC:

Mayor Jesse Arreguin
Councilmember Rashi Kesarwani
Councilmember Terry Taplin
Councilmember Ben Bartlett
Councilmember Kate Harrison
Councilmember Sophie Hahn
Councilmember Susan Wengraf
Councilmember Rigel Robinson
Councilmember Lori Droste
Mark Numainville, City Clerk
Sam Harvey, Esq., Secretary, Open Government Commission