

DOCKETED

Docket Number:	08-AFC-08A
Project Title:	Hydrogen Energy Center Application for Certification Amendment
TN #:	201939
Document Title:	Keri Cobb Comments: Response to Association of Irritated Residents Brown Act Violation Letter Dated Feb. 16, 2014
Description:	N/A
Filer:	System
Organization:	City of Wasco/Keri Cobb
Submitter Role:	Public Agency
Submission Date:	3/31/2014 10:36:36 AM
Docketed Date:	4/1/2014

Comment Received From: Keri Cobb

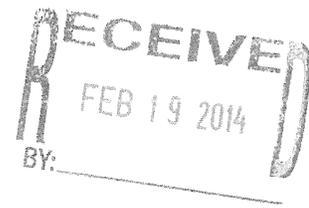
Submitted On: 3/31/2014

Docket Number: 08-AFC-08A

Response to Association of Irrigated Residents Brown Act Violation Letter Dated Feb. 16, 2014

Additional submitted attachment is included below.

Association of Irrigated Residents
Tom Frantz, President
29389 Fresno Ave.
Shafter, CA 93263



February 16, 2014

Chairman Jill Drescher
Members John Pallares, Elizabeth Tapia, Katie Romero, and Pedro Ramirez
Wasco Planning Commission and Planning Department
City of Wasco
746 8th Street
Wasco, CA 93280

Dear Chairman Drescher,

This letter is to call your attention to what the Association of Irrigated Residents believe was a substantial violation of a central provision of the Ralph M. Brown Act. This violation should void an action taken by the Planning Commission acting on behalf of the public and the City of Wasco.

The following describes the nature of the violation: In its meeting of February 10, 2014, the Planning Commission took action by formal vote to approve an amendment to Conditional Use Permit 489-87 to increase the operating capacity of the Savage coal facility from 900,000 tons per year to 1,500,000 tons per year. The item was posted in the February 10, 2014 agenda as part b) under agenda item 8 which was labeled Public Hearing. A copy of the agenda posted online is below.

CITY OF WASCO
PLANNING COMMISSION AGENDA
2nd MONDAY OF EACH MONTH
February 10th 2014 – 6:00 P.M.
City Council Chambers
746 8th Street Wasco, California

8. PUBLIC HEARING

- a) Report, Public Hearing and Possible Approval Re: A Resolution of the Planning Commission of the City of Wasco Approving an Amendment to Conditional Use Permit 13-02 and the accompanying categorical exemption. The applicant is proposing to sell alcoholic beverages for off-site consumption under an Alcoholic Beverage Control (ABC) Type 21 license.

- b) Continued Hearing and Possible Approval Re: A Resolution of the Planning Commission of the City of Wasco Approving an Amendment to Conditional Use Permit 489-87 to increase operating capacity from 900,000 tons of sub-bituminous coal per year to 1,500,000 tons of non-metallic minerals per year.

The action of approval was not in compliance with the Brown Act because the public was not allowed to address the Planning Commission either before or during the Planning Commission's consideration of the item.

The agenda item in question was called a "continued hearing". The item was originally considered at the Planning Commission meeting of January 13, 2014. Public comment was taken at that meeting and then closed. Several commissioners then asked for more time and more information so the item was continued until the next meeting.

On February 10, 2014, several members of the public arrived at the 6 pm meeting and were told they would not be allowed to make comments on this agenda item. Chairman Drescher, with advice from City Counsel, stated that the public comment period had been closed at the previous meeting and would not be reopened.

But, Government Code Section 54954.3 of the Brown Act specifies that every agenda must provide a provision for public comment on every agenda item before any action is taken by the legislative body. The only exception is when a committee of the legislative body has already considered the item at an earlier time and taken public comment. The legislative body does not have to allow further public comment in that situation.

Clearly, the meeting of the Planning Commission on January 13, 2014 was not a "committee" meeting. It was, instead, a regularly scheduled meeting of the entire Planning Commission. The exception noted in the Brown Act does not apply. Therefore,

the Brown Act mandates that public comment should have been taken on the agenda item which is the subject of this complaint.

The facts above clearly explain the Brown Act violation committed by the Planning Commission on February 10, 2014.

What follows are a few more details showing how the public was unjustly denied participation in this public hearing by the Planning Commission: The agenda was publicly posted so that at least four people came to the meeting to speak on the agenda item in question. Nothing in the agenda said there would be a denial of public comment for this particular agenda item. Yet, when these people tried to submit comment cards for this agenda item before the meeting began they were told no comments would be accepted.

During the public hearing on this agenda item one commissioner asked that public comment be taken but Chairman Drescher denied the request after the City attorney incorrectly said she, as chairman, had the option to take public comment or to refuse it.

During the public hearing, Mr. Mobley presented to the Commissioners more detailed information and some new information about the amendment and the proposed operation of the project if the amendment was approved. There was information presented which had not been given to the commissioners at the earlier meeting in January. He spoke about the quantities of coal dust which would be emitted annually and how coal spillage along the railroad tracks would be cleaned. Members of the public had come prepared to give comments on these same issues. Several members of the public had also come prepared to speak about environmental justice issues in regards to how this amendment would affect the hundreds of residents of the farm labor camp adjacent to the Savage facility.

Also, when Ana Martinez, a resident of nearby Shafter and a representative of Greenaction for Health & Environmental Justice, addressed the Commissioners during general public comments, she was rudely interrupted several times by the City attorney who tried to get her to stop talking. She was attempting to tell the Commissioners that their process of dealing with this amendment had failed to adequately inform and consider the hundreds of residents of the Farm Labor Camp immediately adjacent to the project. This is a direct violation of the Brown Act, Section 54954.3 (c) which says the legislative body shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.

At least two written comments concerning this agenda item were also sent by members of the public to the Planning Commission between the January 13, 2014 meeting and the February 10, 2014 meeting. These comments were accepted by the Planning Director, Roger Mobley, and he never indicated, both in person, nor by email, that they would not be considered or be available to the Planning Commission during the public hearing on February 10. Below is a copy of an email from Mr. Mobley to myself on February 6, 2014 where he gives advice on how to submit further comments by email.



mailto:stuart@wasco.com

wasco cup

Roger Mobley <rmobley@wasco.com>
to: "Tom, Jan, Ann" <49@gmail.com> <stuart@wasco.com>

Thu, Feb 6, 2014 at 9:51 AM

Jan, I just got off the phone with Chris. Someone who also sent me a letter and both hers and yours went into my junk file again. In there I can't see your attachment. She ended up sending it to herself and then forwarding it to me and it came through. Long story short I have not received what you are trying to send me and I have your email address in my computer. I don't understand why. Also try sending it to my senior planner at stuart@wasco.com.

Roger Mobley
Planning Director

In other words, in this email, dated February 6, 2014, Wasco's Planning Director apparently did not believe public comments were closed. But, at the meeting on February 10, 2014, Mr. Mobley stated that public comments were closed and any comment letters received since the meeting of January 13, 2014 were not available to the Commissioners. The public were clearly misled by the Planning Director into believing their written comments submitted before the February 10, 2014 meeting were part of the public record for the proceeding. Since they were apparently not included or considered, this constitutes a further violation of the Brown Act.

The Brown Act creates specific obligations for public participation during public meetings of legislative bodies such as the Planning Commission. The Brown Act also creates a legal remedy for illegally taken actions as described above which is namely, the judicial invalidation of these actions upon proper findings of fact and conclusions of law.

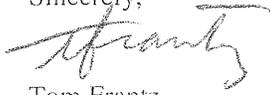
Pursuant to that provision (Government Code Section 54960.1), we demand that the Planning Commission cure and correct the illegally taken action as follows: There must be a formal and explicit withdrawal of the approval of the amendment to CUP 489-87 taken during the February 13, 2014 Planning Commission meeting with the reasons stated for the withdrawal. There must then be a posting of this item to a future agenda of the Wasco Planning Commission and all written public comments received to date and received before the new public hearing on this item must be made part of the public record for that item. Finally, public comment must be received when this item is heard again by the Planning Commission.

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

Since an appeal of the decision by the Planning Commission regarding the Amendment to CUP 489-87 has been made to the Wasco City Council it is consistent with this

complaint that no decision by the City Council be made until all actions related to this complaint are complete including any necessary judicial action.

Sincerely,

A handwritten signature in cursive script, appearing to read "T. Frantz".

Tom Frantz

President, Association of Irrigated Residents

BERNARD G. LE BEAU, JR.
DENNIS R. THELEN
THOMAS S. MCINTOSH
THOMAS A. CREAR
J. NILE KINNEY
BOB H. JOYCE
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CHELSIE L. MORGAN
AMANDA M. LUCAS

OF COUNSEL:

W. STEVEN SHAYER
TERENCE J. WERDEL
JOHN A. JURICH

March 13, 2014

Association of Irrigated Residents
Attn: Tom Frantz, President
29389 Fresno Ave.
Shafter, CA 93263

Re: City of Wasco; Amendment to Conditional Use Permit 489-87 to increase operating capacity from 900,000 tons of sub-bituminous coal per year to 1,500,000 tons of non-metallic minerals per year (the "CUP Amendment")

Dear Mr. Frantz:

This is in response to your letter dated February 16, 2014 to Chairman Jill Drescher and to Members of the City of Wasco Planning Commission (the "Planning Commission" or "Commission"). Our firm represents the Planning Commission with respect to this matter. For at least the reasons set forth below, we disagree with your assertion that there has been a violation of the Ralph M. Brown Act (Cal. Gov't Code § 54950 *et seq.*; hereafter "Brown Act") in connection with the public hearing process pertaining to the Planning Commission's approval of the CUP Amendment.

On January 13, 2014, the Planning Commission conducted a public hearing on the CUP Amendment. The description of the public hearing on the CUP Amendment appeared as follows as an item on the Agenda for the January 13 Planning Commission meeting:

"10. PUBLIC HEARING

- a) Report, Public Hearing and Possible Approval Re: A Resolution of the Planning Commission of the City of Wasco Approving an Amendment to Conditional Use Permit 489-87 to increase operating capacity from 900,000 tons of sub-bituminous coal per year to 1,500,000 tons of non-metallic minerals per year."

The minutes of the January 13 Planning Commission meeting reflect that Chairman Drescher opened public hearing on this agenda item at 7:07 p.m., that a number of individuals from the public (including yourself) then spoke at the January 13 Planning Commission meeting during the public hearing of this agenda item, that Chairman Drescher closed the public hearing on this item at 8:40 p.m. and that the Commission voted to continue this item until its next meeting.

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Tom Frantz, President
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The next regular meeting of the Commission was held on February 10, 2014. The continued hearing on the CUP Amendment appeared as follows as an item on the Agenda for the February 10 meeting:

“8. PUBLIC HEARING

...

- b) Continued Hearing and Possible Approval Re: A Resolution of the Planning Commission of the City of Wasco Approving an Amendment to Conditional Use Permit 489-87 to increase operating capacity from 900,000 tons of sub-bituminous coal per year to 1,500,000 tons of non-metallic minerals per year.”

Several members of the public attended the February 10 Commission meeting. Before the meeting started, the Director of the Planning, Roger Mobley, informed members of the public in attendance that no additional public comment (either verbal or in writing) would be taken regarding this agenda item at the February 10 Commission meeting, as the public comment section of the hearing on the item had already been conducted and closed at the January 13 Commission meeting. The continued public hearing on this agenda item (which, at that point consisted of the Commissioners’ deliberation of the item) was then conducted. After brief discussion among the Commissioners, and between the Commission and its Staff and its Counsel at the February 10 meeting, the Commission voted unanimously (4-0) to approve the CUP Amendment.

Your assertion that the continued hearing on this agenda item at the February 10 Commission meeting violated the Brown Act is without merit.

The Brown Act, adopted in 1953, is intended to ensure the public’s right to attend the meetings of public agencies. To achieve this aim, the Brown Act requires, among other things, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (Cal. Gov’t Code § 54954.2, subd. (a).) The Brown Act “thus serves to facilitate public participation in all phases of local government decision making and to curb misuse of the democratic process by secret legislation of public bodies.” *International Longshoremen’s & Warehousemen’s Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal. App. 4th 287, 293 (citation omitted).

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The Brown Act's statement of intent provides:

"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." Cal. Gov't Code § 54950.

Your letter asserts that the hearing of the CUP Amendment at the second of the above-referenced two Planning Commission meetings violated Section 54954.3 of the Brown Act. Government Code section 54954.3 provides in pertinent part as follows:

"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. . . ."

Here, the Commission held an open public hearing on the single agenda item referenced in your letter (i.e., the CUP Amendment) over the course of two regular Commission meetings. At each of the two meetings, the public was allowed to comment generally on items not on the agenda. In addition, the public was afforded the opportunity to directly address the Commission in regards to the CUP Amendment agenda item at the January 13 meeting before the Commission concluded its consideration of that item. Thus, the Commission's public hearing of the CUP Amendment complied with Section 54954.3.

Your letter misreads Section 54954.2 to require that the Commission provide an opportunity for the public to address this single agenda item at every meeting at which the Commission considered that item. Your letter cites to no authority that would support such a reading of Section 54954.2. Indeed, at least one court has expressly rejected such an interpretation of Section 54954.2. *See Chaffee v. San Francisco Library Com.* (2004) 115 Cal. App. 4th 461 (in which the First District Court of Appeal held that the Brown Act does not require that a general public comment period be provided at each session of a

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continued public meeting held to consider a single published agenda and that the San Francisco Library Commission fully complied with the requirements of the Brown Act by providing opportunity for general public comment during the second day of its two-day meeting held to consider a single agenda).

In finding no violation of the Brown Act, the Court of Appeal in the *Chaffee* case observed: “When the Brown Act and the Sunshine Ordinance are read in their entirety, we conclude that the lawmaking bodies clearly contemplated circumstances in which continuances and multiple sessions of meetings to consider a published agenda would be required, and thus they mandated that a single general public comment period be provided *per agenda*, in addition to public comment on each agenda item as it is taken up by the body.” *Id.* at 469.

Similarly, the Commission acted properly in this matter when it considered the CUP Amendment over the course of two regularly scheduled meetings. Your organization and all other interested members of the public were given a reasonable amount of time to address the Commission before it completed its consideration of the CUP Amendment. The Commission’s public hearing of the CUP Amendment thus comported with the letter and the intent of the Brown Act. *See* discussion in *Chaffee v. San Francisco Library Com.*, *supra*, at 467-468. *See also* 75 Ops. Cal. Atty. Gen. 89, 92 (1992) (“We conclude that section 54954.3 vests the legislative body of a local public agency with wide discretion concerning the adoption of regulations limiting the time at its meetings for public testimony on each issue and for each speaker. A limitation of five minutes or less for each speaker would be valid, depending upon the particular circumstances.”)

In addition to the foregoing, we disagree with the various other assertions of wrongdoing made in your letter, such as your assertions about the public allegedly being “unjustly denied participation in this public hearing by the Planning Commission.” As demonstrated above, the public was clearly not denied participation in the public hearing of the CUP Amendment.

Contrary to what is asserted in your letter, we also do not believe the public was “misled” into believing they would be allowed additional time at the February 10 hearing to comment (either verbally or in writing) on the CUP Amendment. Nor does your letter explain how any such alleged misunderstanding on the part of individual members of the public (after having already been affording an opportunity to address the Commission with respect to the CUP Amendment at the January 13 Commission meeting) would constitute a violation of the Brown Act.

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You further incorrectly assert that Chairman Drescher was somehow required to re-open the public comment section of the hearing with respect to the CUP Amendment at the February 10 Commission meeting, but again you cite to no authority to support such a proposition.

You also incorrectly assert that, at the February 10 Commission meeting, Director Mobley “presented to the Commissioners more detailed information and some new information about the amendment and the proposed operation of the project if the amendment was approved.” The Commissioners were of course entitled to hear from Commission Staff at the hearing of the CUP Amendment, without re-opening the public comment section of the hearing. In any event, Director Mobley essentially directed the Commissioners to portions of the existing record before them that addressed in some fashion issues raised by the public. There was nothing inappropriate about his comments to the Commissioners.

We also disagree with (among other things) your assertion that Ms. Martinez or any other member of the public was treated “rudely” at the February 10 meeting. The public had already been provided the opportunity to address the Commission at the January 13 public comment section of the hearing on this agenda item. Regardless of the substance of whatever else Ms. Martinez or any other individual member of the public may have wanted to add at the February 10 meeting to the prior public comments made with respect to the CUP Amendment, the Commission had closed the public comment section of the hearing and was not required to allow additional public comment with respect to the CUP Amendment. This was explained at the February 10 meeting.

For all of the above reasons, your demand that the Commission “cure and correct the [alleged] illegally taken action” is without merit. We also note that your demand that the Commission take action under Government Code section 54960.1 is procedurally defective. Section 54960.1 provides a procedural vehicle for challenging an action taken by a legislative body of a local agency in violation of specified sections of the Brown Act. Your letter does not allege a violation of any of the sections that are the subject of Section 54960.1. Your reliance on Section 54960.1 is therefore misplaced.

Lastly, as you know, your organization -- together with the Sierra Club and “other concerned residents of Kern County” -- have appealed the Commission’s decision to approve the CUP Amendment to the City Council. The hearing on that appeal before the City Council has been scheduled for March 18, 2014. The public will thus be given yet another opportunity to address the approval of the CUP Amendment, at a public hearing of

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the matter, thereby rendering moot the various assertions made in your letter about the fairness of the process leading to the Commission's approval of the CUP Amendment.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Mark R. Bateman", with a long horizontal flourish extending to the right.

Mark R. Bateman

MRB:sp