



# CITY OF SANTA BARBARA

## COUNCIL AGENDA REPORT

**AGENDA DATE:** November 13, 2018

**TO:** Mayor and Councilmembers

**FROM:** Ariel Calonne, City Attorney  
Paul Casey, City Administrator/City Clerk

**SUBJECT:** Updated City Council Rules Of Procedure

### **RECOMMENDATION:**

That Council adopt, by reading of title only, a Resolution of the Council of the City of Santa Barbara Adopting Rules of Procedure Governing the Conduct of City Council Meetings and Rescinding Resolution No. 15-091.

### **EXECUTIVE SUMMARY:**

During the Council's September 29, 2018, Effective Governance Retreat, the City Council discussed many subjects, including possible changes to its Rules of Procedures. This report and the proposed rule changes are responsive to that discussion.

The proposed rule changes discussed by Council are intended to maximize public participation during the Public Comment and Public Participation portions of the agenda. The Public Comment period occurs near the beginning of the Council's regular meetings and is limited to issues that are *not* on the Council's agenda. The Public Participation portion of the agenda occurs for each agenda item and is limited to the matters under consideration by the Council.

In addition to the Public Comment and Public Participation rule changes discussed by Council, this report also addresses new State Bar rules which eliminate the ability of attorneys to contact Council Members *ex parte* on quasi-judicial matters, unless the Council adopts a rule to allow such contacts.

## **DISCUSSION:**

### **Public Comment Issues**

Over the years, Council has kept Public Comment near the beginning of the agenda in recognition of the importance of allowing individual requests or commentary from the public to have a key time slot – the beginning of the meeting has the greatest public attendance and participation, so commentary during that time period should be expected to have more public impact by reaching more people. In 2015, the City Council amended its Rules of Procedure to double the time for individual Public Comment from 1 minute to 2 minutes.<sup>1</sup> Council also added a second Public Comment period at the end of the agenda to accommodate additional speakers should the early Public Comment period exceed 30 minutes. In addition, in order to allow for “more impactful presentations,” the 2015 rule change allowed individual speakers to “pool” or combine their Public Comment time, i.e., Speaker A might cede her 2 minutes of time to Speaker B, who would then have a total of 4 minutes. The 2015 rule amendments allowed a total of up to 10 minutes of time to be pooled for an individual speaker.

The Council’s retreat discussion considered the effects of the 2015 time pooling rule changes. In general, the Council expressed concern that rather than maximizing the opportunity for public participation, time pooling – particularly when stacked up to the maximum 10 minutes – had the effect of allowing certain viewpoints to monopolize up to 1/3 of the “prime time” 30 minute early Public Comment period.

Public Comment is governed by section 4.12 of the current and proposed rules. Under Section 4.12 of the current and proposed rules and the state’s open meeting law (the Brown Act), every regular Council meeting must include:

“. . . an opportunity for members of the public to directly address the legislative body on any item of interest to the public . . . 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. . . .”  
(Gov. Code, § 54954.3.)<sup>2</sup>

The proposed Rules (4.12.3) would no longer allow an individual to speak up to 10 minutes by “pooling time” from others. Instead, the current individual time limit of 2 minutes would be applied uniformly to all Public Comment period speakers, regardless whether they had donated or “pooled” time from others.

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<sup>1</sup> The November 10, 2015 CAR is available here:

[http://services.santabarbaraca.gov/CAP/MG125833/AS125837/AS125851/AS125853/AI130188/DO130189/DO\\_130189.pdf](http://services.santabarbaraca.gov/CAP/MG125833/AS125837/AS125851/AS125853/AI130188/DO130189/DO_130189.pdf)

<sup>2</sup> The Brown Act limitation of public comment to matters within the City’s “subject matter jurisdiction” is too broad to provide a meaningful limit on public comments.

This change does not impact an individual's ability to appear and speak before the Council in person or to have a designated representative do so if needed due to incapacity or disability. The expected effect of this rule change is that more individual speakers may be accommodated during the early 30 minute Public Comment period.

### **Public Participation Issues**

The Council's 2015 rule changes also extended the opportunity to pool time to Public Participation. As a reminder, the Public Participation portion of the agenda, also required by the Brown Act, allows the public an opportunity to speak to the Council "before or during" consideration of each agenda item. (Gov. Code, §54954.3.) While time pooling has been well-received by the public, Council's retreat discussion focused again upon whether the rule was really maximizing public participation as opposed to allow particular viewpoints to dominate by sheer volume.

The proposed rules modify time pooling during Public Participation on individual agenda items. Currently, Rule 4.12.3 allows up to 10 minutes of pooled time which can be accumulated from other speakers on a one-for-one basis, e.g., Speaker A may pool her 2 minutes with Speakers B, C, D and E at 2 minutes per speaker up to a total of 10 minutes. The rule change would still allow time pooling, but on a one-for-two basis up to a maximum of 5 minutes, e.g., Speaker A may pool her 2 minutes with Speakers B, C and D for a total of 5 minutes.

### **New State Bar Rules**

The State Bar of California recently completed a much anticipated, decade long overhaul of the Rules of Professional Conduct for attorneys. New Rule 3.5 – which is very similar to the Council's own ex parte contact rules, provides as follows:

***“Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:***

- (1) in open court;
- (2) with the consent of all other counsel and any unrepresented parties in the matter;
- (3) in the presence of all other counsel and any unrepresented parties in the matter;
- (4) in writing with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
- (5) in ex parte matters.” (Rules of Professional Conduct, Rule 3.5(b); emphasis added.)

The important new portion of the rule adds this:

“As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; **(iv) members of an administrative body acting in an adjudicative capacity;** and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.” (Rules of Professional Conduct, Rule 3.5(c); emphasis added.)

The commentary to the rule and the comments made during its adoption process make it clear that the City Council (and all other quasi-judicial City entities) are an “administrative body” within the meaning of Rule 3.5 when acting in a quasi-judicial capacity. Accordingly, unless Council takes action to allow ex parte communications by attorneys, they will be prohibited on quasi-judicial matters like land use appeals or permit revocations.<sup>3</sup> This rule affects private attorneys, as well as the City Attorney’s Office and any City staff who may also be lawyers. We’ll address those two categories separately.

### **Staff Attorneys**

The vast majority of staff attorney contacts with the City Council are covered by exceptions to the rule, i.e., in “open court” (a)(1), in the presence of other counsel (a)(3), or in writing with copies to other counsel (a)(4). Nonetheless, in order to avoid any appearance of impropriety, we recommend that Council adopt a limited rule authorizing staff attorneys to do two things: 1) Contact decision makers on non-substantive or procedural matters, and 2) Allow neutral legal advisors (typically the City Attorney) to communicate oral and written advice publicly or confidentially with Council as allowed by state or federal law and constitutional due process principles.

The new proposed staff attorney rule would read as follows:

- 4.14.14. Ex Parte Contacts by Staff Attorneys. Pursuant to Rule 3.5 of the California Rules of Professional Conduct, attorneys who represent the City, and City staff or contractors who happen to be attorneys but who are not engaged to represent the City, may:

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<sup>3</sup> The State Bar rules commentary says, “State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.”

- 4.14.14.1. Contact the City Council ex parte on non-substantive or procedural matters (such as scheduling or other legal requirements) or
- 4.14.14.2. When acting in a neutral, non-adversarial capacity, communicate oral or written legal advice publicly or confidentially to the City Council as allowed by state or federal law, and as consistent with statutory fair hearing rights and constitutional due process principles.

### **Private Attorneys**

While the City Council's Rules of Procedure establish Council policy "to avoid and discourage" ex parte contacts, they are not prohibited outright except during the time between closure of a public hearing and the Council's final decision. From time to time, private attorneys will attempt to meet with or to send written materials directly to Council, sometimes over weekends and usually without copying staff or the "other side" in a contested matter. These communications are virtually always substantive about the merits of a decision, and not merely procedural. Unless the Council adopts a new rule **permitting** private attorneys to continue ex parte contacts, they will be prohibited by the State Bar Rules of Professional Conduct.

We have no recommendation on this issue. We would note that if private attorneys are not permitted to engage in ex parte contacts, they will likely use non-lawyer surrogates to accomplish the same result. We would also note that it seems inconsistent with the basic ex parte contact rule to enact a new rule that permits lawyers to do what is explicitly discouraged by Council policy.

Should Council wish to permit ex parte contacts by attorneys, we would propose the following rule which includes a self-reporting mechanism for private attorneys to report their ex parte contacts before the matter is heard by the Council:

- 4.14.15. Ex Parte Contacts by Outside Attorneys. Pursuant to Rule 3.5 of the California Rules of Professional Conduct, attorneys employed by persons doing business with the City ("non-staff attorneys") may participate in ex parte contacts, should they occur, as provided in this rule. Any non-staff attorney who participates in an ex parte contact shall file written notification of such contact with the City Clerk, on a form including the content approved by the City Attorney, no later than 2:00 p.m. the day before the City Council meeting at which the subject matter of the ex parte contact is considered. The City Clerk shall provide a list of ex parte contact notifications to the Council before each meeting.

**ATTACHMENT(S):** A Resolution Of The Council Of The City Of Santa Barbara  
Adopting Rules Of Procedure Governing The Conduct Of City  
Council Meetings And Rescinding Resolution No. 15-091

Exhibit A to the Resolution: November 13, 2018 City of Santa  
Barbara City Council Procedures

**PREPARED BY:** Ariel Calonne, City Attorney

**SUBMITTED BY:** Ariel Calonne, City Attorney

**APPROVED BY:** City Administrator's Office