

SANTA BARBARA COUNTY COUNTY COUNSEL MEMO

To: John McInnes, County Executive Office
From: Shane Stark, County Counsel
Re: Vision Committee and Brown Act



February 3, 2006

At the last meeting of the Goleta Vision Committee, the legal opinion of County Counsel was requested on whether the Committee must comply with the California Open Meeting Law ("Brown Act") and related questions about the vision committee process. The issues addressed by this memo and our summary conclusions follow.

1. *Whether the committee is subject to the Brown Act.*

The Committee is not a legislative body subject to the Brown Act because it was not created by formal action of the Board of Supervisors. Board of Supervisors action allocating funds for the visioning process is not considered formal action creating the committee; rather, the action allows the work of the committee created by Supervisor Susan Rose and convened by the County Executive Office to proceed.

The committee has two main work goals: (1) Consider appropriate housing sites that staff will present to the Planning Commission in connection with the Housing Element of the County General Plan; and (2) provide a vision of the land use, transportation, recreation, and disaster preparedness issues and concepts the community wants evaluated in an update of the Goleta Community Plan.

Under the committee ground rules, the public may observe and participate to some degree in committee meetings (see adopted Ground Rule 7 on public participation and observation). This voluntary transparency and facilitation of citizen input into the planning process is consistent with the spirit and purposes of California open meeting laws. The Brown Act requires the County to comply with the notice, access, and other mandates only if the Board of Supervisors takes formal action to create an advisory committee (Government Code § 54952(b)). (Under AB 1234, members of Brown Act legislative bodies who are paid or reimbursed must take State-mandated ethics training.) The Board of Supervisors only provided funding for the visioning process. It did not establish a Plan Advisory Committee (PAC) by formal action under General Plan Advisory Committee Guidelines (Resolution No. 91-121), appoint its members or otherwise take formal action to create the committee as a county "legislative body."

The Goleta Vision Committee was created by Supervisor Rose and is convened, facilitated and managed within the framework of the County's comprehensive planning process by the County Executive Office. The Committee advises county staff and the District Supervisor and informs the planning process. The rules adopted by the committee further the goals of citizen participation in planning and open government. The committee is not required by law to meet in public. If desired, the committee may hold closed meetings and subcommittee meetings, so long as the rules of the visioning process allow.

2. *Whether persons attending the meeting can tape the meeting.*

Because the committee is not subject to the Brown Act, it is not required to meet in public or comply with its procedures. There is no general right to tape a business meeting hosted by a government agency.

If the meeting is conducted under the Brown Act, video and audio taping must be allowed unless there is a determination that taping is persistently disrupting the meeting.

3. *Whether the committee ground rule that members should refrain from public criticism of the vision process without first bringing their concerns to the group is an unconstitutional infringement on free speech.*

This question is moot. The committee did not adopt Ground Rule #5 proposed by the facilitator that committee members should discuss matters among themselves before going public.

The ground rules are intended to provide a basis for "collaborative communication" and "boundaries for fair and civil behavior and group decision making." We interpret them as guidelines for how the group should function and interact, not regulations that prohibit anyone from talking or otherwise chill or suppress protected rights of expression. The committee may establish rules of group process and expect that committee members will behave in a way that fosters productive committee work.

4. *Whether the County is required to televise the meetings.*

The County is not required to televise the committee meetings, whether or not the committee is considered a legislative body subject to the Brown Act.

5. *Whether the County will indemnify the committee members if they are sued.*

Committee members are volunteers, not county officers or employees. If, for some reason, committee members are sued for damages on a theory of civil rights violation (this is remote and most likely unavailing), the County will defend and indemnify them under its memorandum of coverage with the CSAC Excess Insurance Authority.

If the members attend a committee meeting and discuss County business, and the individual members as well as the County are sued for violating the Brown Act, the County will defend the suit, represent individual committee members named as defendants, and pay any judgment of costs and attorneys fees. Damage awards against individuals are not available in these cases.

FACTS

The Goleta Community Plan was adopted in August, 1993 and last amended in 1995. The effective date for portions of the Goleta Community Plan within the Coastal Zone is June 9, 1994. The Board of Supervisors appointed a 13-member Community Plan Advisory Committee to advise on the development of the Plan.¹ The Board also certified an Environmental Impact Report for the Community Plan (EIR No. 91-13).

¹ Alissa Hummer, now Executive Assistant to Supervisor Rose, was then a planner with the Comprehensive Planning Division and the County Project Manager for the Goleta Community Plan.

The City of Goleta was incorporated effective February 1, 2002. The Old Town Goleta Redevelopment Area and much of the commercial and residential plan area are now within that city and outside the land use planning jurisdiction of the County. Substantial territory in the Goleta Community Plan area remains in unincorporated Santa Barbara County.

The County is required to adopt and maintain a Housing Element of its General Plan in compliance with State Law.² This requires that the County adopt policies to promote housing opportunities and identify sites throughout the unincorporated county where affordable housing (including various types of special needs housing) can be built.

The Board of Supervisors has not rescinded the Goleta Community Plan. In light of the incorporation of a significant part of the plan area and the need to amend and implement the Housing Element of the County's General Plan, the Board has recognized the need to update the Goleta Community Plan so that it provides a coherent guide for land use in the East Goleta Valley or "Noleta" community in light of modern laws and circumstances.

In May, 2005, the Board of Supervisors appointed the Second and Third District Supervisors and Planning Commissioners to serve as an Ad Hoc Subcommittee to provide guidance and direction to staff on a strategy for obtaining Housing Element certification and to work with the community toward completing the Action Phase of the Housing Element.³

On October 18, 2005, the Board of Supervisors, considering allocation of unanticipated revenue resulting from the early repayment by the State of "VLF Gap Loan Funds," passed a motion that ... "Approved allocation of \$43,000 to Goleta Valley Visioning Process (Second District)."⁴

On October 21, 2005, the Ad Hoc committee reported to the Planning Commission that:

"A new process has been established by the Board of Supervisors to allow the East Goleta Valley Community to have more input into which sites will be considered in the [Environmental Impact Report for the Housing Element.] This 'visioning' process is a precursor to an update to the Goleta Community Plan."

There is no reference to a committee. The Ad Hoc committee report goes on to describe the relation of the Housing Element Process to the Goleta visioning process:

² Government Code Title 7 Division 1 Chapter 3 Art. 10.6 Housing Elements §§ 65580-65589.5. See County Counsel Memo to Planning Commission Re State Housing Laws as Recently Amended (November 1, 2005) for a discussion of the county's obligations under the Housing Element Law.

³ The County submitted a draft revised Housing Element (called the "certification amendment") to the State Department of Housing and Community Development on September 30, 2005. Numerous exchanges and tweaks to the draft occurred over the next 60 days. On December 2, 2005, HCD notified the County by letter that the certification amendment, if approved by the Board of Supervisors, would be conditionally approved by HCD. The conditions for approval include numerous action items, with time frames for completion. Among the action items is the rezoning of 62 acres within the unincorporated area of the County at 20 units per acre within one year of adoption. The amendment to the Housing Element is scheduled to be heard by the Board in Spring 2006.

⁴ The motion approving funding for the visioning process deferred action on the CEO-recommended Public Information Officer item. The CEO's board letter identified work on the unincorporated Goleta Valley visioning process as one of the activities that would be funded by adding \$160,000 to the Comprehensive Planning budget; it recommended that this funding allocation be deferred. (See p.5, Needs Deferred for Future Consideration 6(c).)

“Following the November 28th [Planning Commission hearing on specific sites] the county will begin environmental analysis of the North County sites identified by the Planning Commission, as well as other ordinance amendments identified as action items in the Housing Element. The Goleta visioning process will take place concurrent with the drafting of the Housing Element EIR. In April, 2006, the East Goleta Community will submit sites to the county that they recommend for evaluation in the EIR. The county will then incorporate analysis of these sites into the EIR and release a draft for public review in Summer 2006....”

The Board minutes reflect no action creating or defining the work of the Visioning Committee. The Committee was selected and appointed by Supervisor Rose. The County Executive Office used the funds allocated by the Board to hire a facilitator to manage the visioning process. On November 17, 2005, Supervisor Rose announced the formation of a committee, issued a press release, and sent an e-mail to East Goleta Valley residents inviting them to apply.

The Comprehensive Planning Division’s report to the Planning Commission for its November 28, 2005 hearing on Housing Rezone Options advises that State law requires that the county rezone 66⁵ acres of land countywide to accommodate its “fair share” housing need allocation for the 2003-08 planning period. It states that the list of sites presented for further study at the hearing:

“...does not include sites in the areas of Eastern Goleta Valley....The Eastern Goleta Valley will participate in a visioning process for their community through which potential sites will be identified and submitted to the Planning Commission in April 2006.” (p.1.)

The same report, in its discussion of site identification, states that the Santa Ynez and Isla Vista communities are currently undergoing community plan creation efforts that will analyze sites to be rezoned – these sites are evaluated elsewhere than in the Housing Element EIR.⁶

“With respect to the Eastern Goleta Valley, a community plan update process is about to be initiated. This effort will include a visioning process that, in part, will identify potential sites for rezoning. These sites will be forwarded to the Planning Commission for inclusion in the Housing Element EIR in April 2006....Community profiles are ...included for the communities with the exception of the Isla Vista, Santa Ynez, and Eastern Goleta communities where other site identification efforts are underway.” (p.9.)

The Comprehensive Planning Division 2005-08 Work Program contains several references to the Goleta Community Visioning process. There is no specific reference to a committee.⁷

⁵ The State since agreed to reduce the acreage from 66 to 62 acres.

⁶ Residential sites in the Isla Vista and Santa Ynez Valley communities have been identified for purposes of environmental review in the Isla Vista Master Plan and the Santa Ynez Valley Community Plan and will be evaluated in the EIRs for these plans. Acreage approved through these processes will be accounted for in the 62 acres the County has committed to.

⁷ See First Quarter Report p.4 (“A unique component of the Housing Element Update includes the recent inclusion of the Goleta Community Visioning Process to the overall work effort”); p.6 (“the Goleta Visioning process will submit a list of sites they recommend for consideration in the EIR to the Planning Commission...This work effort includes ...Support to Visioning Process....”)

The November 17, 2005 e-mail says Supervisor Rose is forming a Goleta Community Plan Update Visioning Committee ("GVC 2020") to help guide long range planning for the eastern Goleta Valley. The public press release advises that:

Supervisor Susan Rose is seeking a wide cross-section of residents of the unincorporated 2nd District to serve on a committee that will oversee the next Update of the Goleta Community Plan. A Community Plan provides guidance on a variety of development issues for a community for 10 or more years.

The Goleta Visioning Committee will meet frequently starting at the beginning of 2006 and will be charged with helping direct land use and public services planning for the unincorporated portion of the Goleta Valley.

Input will be sought on residential, agricultural, commercial and industrial land uses; parks and trail planning; traffic and circulation planning; and provision of public services, among other topics. Visioning meetings will be open to the public and committee members will be asked to commit to attending the meetings for at least 6 months.

Applicants would ideally have an interest in or understanding of land use and circulation issues, public safety, consensus building and be involved in their community or neighborhood.

The Second District Supervisor's Office developed a general selection criteria for selecting committee members; reviewed all applications utilizing criteria and selected committee; sent an email to those selected; directed the process facilitator to interview each individual to discuss the process and confirm their participation; and sent out a press release announcing the commencement of the planning effort and selection of committee members.

At its initial meeting, the committee considered Ground Rules/Terms of Engagement proposed by the facilitator. It modified proposed rules on public participation and public statements as follows. (Proposals that were not adopted by the committee are in ~~strikeout~~. Language added by the committee is underlined.)

Basic Conduct and Decision Making Rule 7. **Participation and Observation by Members of the Public:** All GVC meetings are open to the public and observers are welcome. Evening meetings of the GVC are meant to be working meetings focused on collaboratively developing a recommendation to the Planning Commission regarding the Community Plan Update. ~~As such, the meetings are not designed to be opportunities for soliciting input from the general public. However, Members of the public will have an opportunity to address the Committee at some point during each meeting for a period of up to 2 minutes individually and 15 minutes in the aggregate.~~ Members of the public are also encouraged to raise their concerns directly with GVC members before or after the meetings as well as during breaks to ensure that all issues of significant concern to the public are considered in the GVC's deliberations. Separate Saturday workshops are geared to soliciting a broader public dialogue where public input is encouraged. Members of the public are encouraged to submit written materials in advance of the meetings via the Facilitator.

Participant Rule 5. ~~Public Statements: Participants agree to refrain from public criticism of the Goleta Vision Process without first bringing such concerns to the group and its facilitator for discussion.~~

DISCUSSION

1. *The Visioning Committee is not subject to the Brown Act because it was not created by formal action of the Board of Supervisors.*

The California Open Meeting Law or "Brown Act" provides that all meetings of legislative bodies of local agencies, including counties, be open and public, and conducted under rules stated in the Act. Government Code § 54952 defines "legislative body" to mean the governing body of a local agency (here the board of supervisors of Santa Barbara County) and:

(b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body.⁸ (emphasis added)

The Board of Supervisors did not take formal action to create the Vision Committee. It funded a visioning process within the County Executive Office. The committee was created by, and its members appointed by, the Second District Supervisor.

The Vision Committee has two main work goals. The first is to identify sites that might be suitable for affordable housing. Staff will present the identified sites to the Planning Commission for consideration in the Housing Element process. The second is a broader process of identifying community concerns about land use, transportation, emergency preparedness, and other traditional items of community planning concern.

The Vision Committee may be a precursor to a true General Plan Advisory Committee established and appointed by the Board. It will provide input into the development of the Housing Element, as well as any update to the Goleta Community Plan. It is not, however, a board-created plan advisory committee.

In 1991, the Board of Supervisors passed Resolution No. 91-211, adopting General Plan Advisory Committee (GPAC) Guidelines. The Guidelines provide that:

"GPACs are established primarily to advise the Board of Supervisors, Planning Commission, RMD, and other County officials on matters relating to the implementation and periodic modification of the Comprehensive Plan. These committees are creations of the County Board of Supervisors;... [The Board] has discretion to create, modify and terminate GPACs, their membership, mission statement, schedule, etc. at any time."

⁸ Compare Gov. Code § 54952(c)(1)(A). Under this provision of the Brown Act, a "legislative body" includes a body that governs a private entity that is "created by the legislative body" to perform governmental functions. An entity is "created" if the legislative body "played a substantial role in bringing the [private corporation] into existence." *Epstein v. Hollywood Entertainment Dist.* (2001) 87 Cal.App.4th 862; *ILWU v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287. This requires an analysis of the facts of each particular case. Unlike § 54952(b), § 54952(c) does not require formal action of the legislative body to create a Brown Act body.

The Board of Supervisors has since appointed or ratified by the local district Supervisor of members of several community plan advisory committees – The Board approved Plan Advisory Committees for Goleta, Montecito, Orcutt, Isla Vista and Santa Ynez Valley Community Plans.⁹ Such board-appointed committees are subject to the Brown Act.

In contrast, an amendment to the Goleta Community Plan has yet to be initiated. The Housing Element amendments, which apply to all unincorporated communities within the County, are going forward under a parallel process. Upon request or when an amendment to the Goleta Community Plan is initiated, the Board may create a GPAC or constitute the visioning committee as the GPAC.¹⁰

Neither County staff nor a single supervisor can create a GPAC; approval of the legislative body is required. GVC 2020 indeed has a role in the planning process.¹¹ By design, committee meetings are open to public observation and participation.¹² The proposed public notice of committee meetings and opportunity for the public to participate are consistent with the general spirit and purposes of the Brown Act.¹³ Neither the committee's function nor its transparency gives the Committee the same legal status as a board-appointed GPAC, so as to trigger the State-mandated requirements of the Brown Act.¹⁴ Because the Board took no action to create the committee or appoint its members, and there is no reference to the committee in staff reports presented to the Board, in our opinion the legislative body did not create the Goleta Vision Committee and it is not required to comply with the requirements of the Brown Act.

2. Because the committee is not subject to the Brown Act, there is no right of persons attending the meeting to tape it.

The Brown Act specifically provides for taping of open and public meetings.

⁹ In Isla Vista, the Redevelopment Agency Project Area Committee, composed of residents selected in accordance with the Community Redevelopment Law, also serves as the GPAC for the Isla Vista Master Plan.

¹⁰ The GPAC Guidelines are just that – they are not inflexible rules. (This is particularly so in light of the reorganization of the executive branch of county government, including placing responsibility for comprehensive planning in the County Executive Office.) If the Board of Supervisors wants to constitute the GVC2020 committee as a GPAC before formal initiation of a Community Plan update, it may do so.

¹¹ The process of updating the County General Plan and Community Plans is managed by the Comprehensive Planning Division of the County Executive Office. As indicated, the committee will provide input on potentially suitable housing sites for use in the Housing Element process and conceptual recommendations regarding the update of the Goleta Community Plan.

¹² See Committee Decision Making Rule 7. The proposed rule was modified to provide not only that “All GVC meetings are open to the public and observers are welcome” but also that “members of the public will have an opportunity to address the committee at some point during each meeting for a period of up to 2 minutes individually and 15 minutes in the aggregate.”

¹³ See Gov. Code § 54950 “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.” Cal. Const. Art. I § 3(b), added by initiative (Proposition 59) in 2004, provides a constitutional right to open government, including public meetings and public records.

¹⁴ The Brown Act has numerous specific requirements regarding publication, agendas, and meeting accessibility that may be considered State mandates on the County. (This is contested, but the subject is beyond the scope of this memo). Additionally, under AB 1234 of 2005, if a local agency pays or reimburses the members of a legislative body subject to the Brown Act, the members must comply with Local Agency Ethics Training requirements. Each local agency official shall receive at least two hours of training in general ethics principles and ethics laws relevant to his or her public service every two years See Gov. Code §§ 53235(a); (§ 53234(b)).

§ 54953.5 (a) Any person attending an open and public meeting of a legislative body of a local agency shall have the **right to record the proceedings** with an audio or video tape recorder or a still or motion picture camera **in the absence of a reasonable finding** by the legislative body of the local agency **that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.**

We have concluded that the GVC2020 committee is not subject to the Brown Act. Thus, the committee may conduct business meetings that are not open to the public and is not required to comply with the specific provisions of the Act. It may exclude the public or limit public participation at these meetings.

The committee has approved Ground Rules and Terms of Engagement. Under these principles, if the group wants to allow or prohibit taping of its meetings, it may do so.

3. The committee did not adopt the proposed ground rule that members should refrain from public criticism of the vision process without first bringing their concerns to the group. The question whether such a rule would unconstitutionally infringe rights of expression is moot. In any event, we interpret the committee ground rules as guidelines for group behavior and not as regulations prohibiting any committee member from communicating with the press or the general public.

The facilitator proposed Ground Rule #5 that committee members should discuss matters among themselves before going public. The committee did not adopt this rule. The question whether this constitutes an unconstitutional restraint on rights of expression is thus moot.

The ground rules are intended to provide a basis for “collaborative communication” and “boundaries for fair and civil behavior and group decision making.” We interpret them as guidelines for how the group should function and interact. The committee cannot exercise any aspect of the County’s police power. The ground rules are not regulations that prohibit anyone from talking to the media or the general public or otherwise exercising rights of expression.

The Committee may reasonably expect that its members will act consistently with the rules adopted by the group. Problems with individual members should first be addressed through the facilitator, then communicated to County staff. The person who selected the committee members, Supervisor Rose, has the right to discharge and replace a committee member if she believes that person’s behavior detracts from, rather than fosters, productive committee work.

4. The County is not required to televise the committee meetings.

The Brown Act (Gov. Code § 54953) provides that:

a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

(b) (1) ...[The] legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law.

Meetings of local agencies that are subject to the Brown Act must be open and accessible to the public, and all persons must be allowed to attend. An agency has no duty to televise its meetings, and there is no corresponding right of the public to watch government meetings on televisions. Teleconferencing meetings is optional, as is televising meetings, whether or not a body is subject to the Brown Act.

5. If committee members are sued for damages for negligence or violation of civil rights, they are covered by the County's insurance program and will be defended and indemnified for compensatory damages. If committee members are sued as individuals for violating the Brown Act, the County will defend the lawsuit and represent them as a matter of course.

Committee members are volunteers, not county officers or employees. Even so, volunteers are covered persons under the County's Memorandum of Coverage with the California State Association of Counties Excess Insurance Authority. If, for some reason, committee members are sued for damages on a theory of civil rights violation (this is remote and most likely unavailing), the County will defend and indemnify them from legal costs and compensatory damages for acts done in the course and scope of committee service. This is true even if individual committee members are found to be negligent.¹⁵

The committee is not a legal entity. Any suit claiming a Brown Act violation by the committee or asking the court to declare that the committee is subject to the Act will name the County as a defendant. If committee members attend a meeting and discuss County business, a civil lawsuit claiming the committee is filed, and individual members as well as the County are named as defendants, the County will defend the civil action, defend individual committee members named as defendants, and pay any judgment of costs and attorneys fees that may be awarded. Damages are not available in this type of action.¹⁶

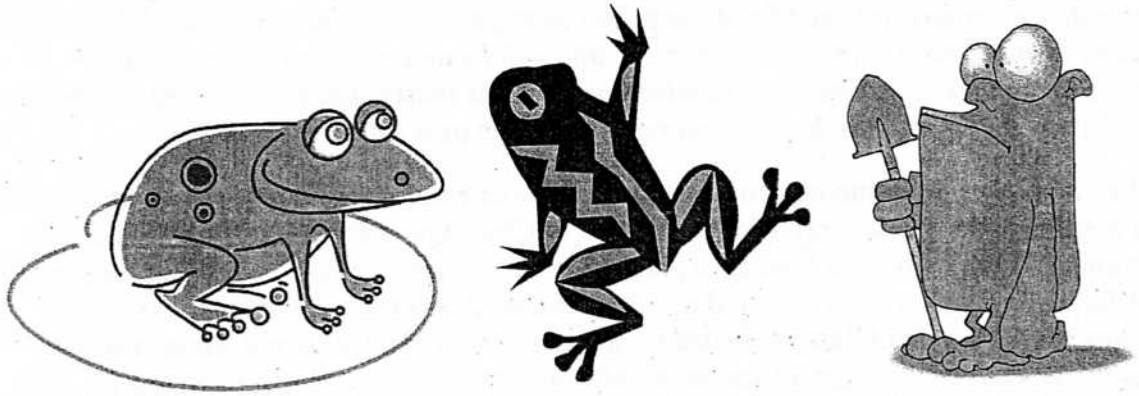
Because the Committee does not have authority to make binding decisions or recommendations, it is unlikely that a suit to invalidate its actions (§ 54960.1) or a criminal prosecution (§ 54959) could be brought against individual members.¹⁷

¹⁵ This applies to acts done in the course and scope of county service. See Gov. Code § 995 (duty to defend and indemnify for acts done in course and scope of public employment); § 995.2 (no indemnity for acts outside course and scope or done with actual fraud, corruption or malice). The right to defense and indemnity does not extend to punitive damage awards. This requires separate board of supervisors consideration and findings (see § 825(b)).

¹⁶ See Gov. Code § 54960 "(a) The district attorney or any interested person may commence an action [to stop or prevent] violations or threatened violations of [the Brown Act] by members of the legislative body ... or to determine the applicability of [the Act] to actions or threatened future action of the legislative body, or to determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid..."

¹⁷ § 54959. "Criminal violation; penalty for unlawful meeting. Each member of a legislative body who attends a meeting of that ... body where action is taken in violation of any provision of [the Act], and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled ..., is guilty of a misdemeanor." Thus, to constitute a criminal Brown Act violation, there must be action taken and intent to deprive the public of information. Under § 995.8, "A public entity is not required to provide for the defense of a criminal action or proceeding ... brought against an employee ..., but a public entity may provide for the defense of a criminal action or proceeding ... brought against an employee ... if: (a) The criminal action ... is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and (b) The public entity determines that such defense would be in [its] best interests ... and that the employee ... acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity."

Please provide the committee members with copies of this memo. Let me know if you or the Committee requires further advice.



C: Supervisor Susan Rose