



Open Government Commission

AGENDA FOR OPEN GOVERNMENT COMMISSION

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Civic Center
2180 Milvia St.
Cypress Room (1st Floor)

Regular Meeting
September 19, 2019
8:00 p.m.

Secretary: Emmanuelle Soichet, Deputy City Attorney

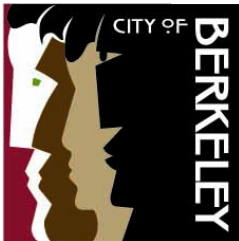
The Commission may act on any item on this agenda

1. Call to Order 8:00 p.m.
2. Roll Call.
3. Public Comment. *Comments on subjects not on the agenda that are within the Commission's purview are heard at the beginning of meeting. Speakers may comment on agenda items when the Commission hears those items.*
4. Reports.
 - a. Report from Chair.
 - b. Report from Ombudsman Subcommittee.
 - c. Report from Staff.
5. Approval of minutes for the June 20, 2019 regular meeting.
6. Recommendations from Democracy Project Subcommittee on amendments to Council Rules of Procedure; discussion and possible action.
7. Adjournment.

Communications

- Email and article from Steve Martinot.

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Open Government Commission

DRAFT MINUTES

Civic Center
2180 Milvia Street
Cypress Room (1st Floor)

Regular Meeting
June 20, 2019

Members Present: Jessica Blome (Acting Chair), Janis Ching, Patrick O'Donnell, Daniel Saver, Jedidiah Tsang, Brad Smith

Members Absent: Mark McLean (excused), Dean Metzger (excused)

Also Present: Emmanuelle Soichet, Staff Secretary/Deputy City Attorney

1. **Call to Order**

Chair called the meeting to order at 8:02 p.m.

2. **Roll Call**

Roll call taken.

3. **Public Comment (items not on agenda)**

One speaker on matters not on agenda.

4. **Reports**

a. Report from Chair.

No report.

b. Report from Democracy Project Subcommittee.

Public comment: 2 speakers.

Discussion: Commissioner Saver gave an update on subcommittee status. Report and recommendations from subcommittee will be included in next meeting's agenda. Commissioner Tsang will replace former Commissioner Tsui on the subcommittee.

c. Report from Ombudsman Subcommittee.

Public comment: 2 speakers

Discussion: No report.

d. Report from Staff.

No report.

5. **Approval of Minutes for the May 16, 2019 Regular Meeting**

- a. Public comment: One speaker.
- b. Commission discussion and action.

Motion to adopt draft minutes (M/S/C: O'Donnell/Ching; Ayes: Blome, Ching, O'Donnell, Saver, Smith, Tsang; Noes: None; Abstain: None; Absent: McLean (excused), Metzger (excused)).

6. **Update on City budget process and Council budget referral regarding Good Government Ombudsman; discussion and possible action.**

- a. Public comment: Two speakers.
- b. Commission discussion and action.

Motion to recommend that Chair Metzger and Vice Chair Bloome consult and attend the June 25 City Council meeting and express on behalf of the Commission the support for a position and explain its importance considering increasing resource needs to enforce new ordinances and with upcoming elections (M/S/C: O'Donnell /Smith; Ayes: Blome, Ching, O'Donnell, Saver, Smith, Tsang; Noes: None; Abstain: None; Absent: McLean (excused), Metzger (excused)).

7. **Proposal for Commission to address issues regarding Discretionary Council Office Budgets; discussion and possible action.**

- c. Public comment: One speaker.
- d. Commission discussion and action.

Motion to postpone item to a future meeting (M/S/C: Smith/O'Donnell; Ayes: Blome, Ching, O'Donnell, Saver, Smith, Tsang; Noes: None; Abstain: None; Absent: McLean (excused), Metzger (excused)).

8. **Adjournment**

Motion to adjourn (M/S/C: Saver/Ching; Ayes: Blome, Ching, O'Donnell, Saver, Smith, Tsang; Noes: None; Abstain: None; Absent: McLean (excused), Metzger (excused)).

The meeting adjourned at 8:41 p.m.

Open Government Commission Subcommittee Report

June 6, 2019

Minutes

1. Call to Order 7:30 p.m.

Roll Call:

2. Roll Call taken - Metzger & Saver

3. Public Comment

None

4. Review of May 9, 2019 subcommittee meeting

Reviewed

5. Discussion and possible action on Council Consent Calendar issues

See following report.

6. Discussion and possible action on the inflexibility of the Council Agenda Order.

See following report

7. Discussion and possible action on Public Comment procedures

See following report

8. Next meeting date

9.

No date set

10. Adjournment

Motion to adjourn: Saver

Ayes: Metzger & Saver

Subcommittee Report

The Pro-Democracy issues before the subcommittee:

1- City government procedures that essentially silence the people.

1- The Loss of Access to Determine the Consent Calendar

Proposal:

Council Rules of Procedure and Order – Adopted January 29, 2019

IV. CONDUCT OF MEETING

B. Consent Calendar There shall be a Consent Calendar on all regular meeting agendas on which shall be included those matters which the Mayor, councilmembers, boards, commissions, City Auditor and City Manager deem to be of such nature that no debate or inquiry will be necessary at the Council meetings. Ordinances for second reading may be included in the Consent Calendar.

It is the policy of the Council that councilmembers wishing to ask questions concerning Consent Calendar items should ask questions of the contact person identified prior to the Council meeting so that the need for discussion of consent calendar items can be minimized.

Consent Calendar items may be moved to the Action Calendar by the Council. Action items may be reordered at the discretion of the Chair with the consent of Council.

Insert paragraph that reads as follows:

An item on the consent calendar shall be moved to the action calendar if five (5) or more speakers request that the item move to the action calendar. The Mayor may implement this as she or he sees fit. One implementation path is as follows: if a speaker requests that an item on the consent calendar move to action, then the Mayor will poll the audience to determine whether five (5) members of the public would like to pull the item, and, if so, the item shall be moved to action.

Motion to send added language to the OGC: Metzger

Ayes: Metzger and Saver

2- Speaking Time:

From the Councils Rules of Procedures and Order
Page 17 – Item A

A. Comments from the Public

Public comment will be taken in the following order:

An initial ten-minute period of public comment on non-agenda items, after the commencement of the meeting and immediately after Ceremonial Matters and City Manager Comments.

Public comment on the Consent and Information Calendars.

Public comment on action items, appeals and or public hearings as they are taken up under procedures set forth in the sections governing each below.

Public comment on non-agenda items from any speakers who did not speak during the first round of non-agenda public comment at the beginning of the meeting.

Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. A speaker wishing to yield their time shall stand, shall be recognized by the chair, and announce publicly their intention to yield their time. Disabled persons shall have priority seating in the front row of the public seating area.

AGENDA ITEM 8

A member of the public may only speak once at public comment on any single item, unless called upon by the Mayor or a Councilmember to answer a specific inquiry.

Add the following to this section:

A member of the public will be given a minimum of 2 minutes to speak and up to a maximum of four (4) minutes, if given time from another speaker. If the number of speakers appears to be so large as to prevent essential city business from completion, then the item can be moved to a special meeting.

Motion to send added language to the OGC: Metzger

Ayes: Metzger and Saver

3- The Inflexibility of the Agenda Order

From the Councils Rules of Procedures and Order
pages 15 & 16 – Item E

E. Agenda Sequence and Order of Business The Council agenda for a regular business meeting is to be arranged in the following order:

1. Preliminary Matters: (Ceremonial, Comments from the City Manager, Public Comment)
2. Consent Calendar
3. Action Calendar
 - a) Appeals
 - b) Public Hearings
 - c) Continued Business
 - d) Old Business

AGENDA ITEM 8

- e) New Business
- f) Referred Items
- 4. Information Reports
- 5. Communications
- 6. Adjournment Action items may be reordered at the discretion of the Chair with the consent of Council.

The Agenda Committee shall have the authority to re-order the items on the Action Calendar regardless of the default sequence prescribed in this section.

Add the following to this section:

The City Clerk shall poll the public audience during the ceremonial and consent agenda to determine the number of persons at the meeting for action items. If the number exceeds twelve (12) for any one item, that item is moved to the first action item. If more than two items exceed 12, then the order for those items will be determined with the highest number going first.

Motion to send added language to the OGC: Metzger

Ayes: Metzger and Saver

4- The "Public Comment" procedure reduces people "faces in the crowd."

From the Councils Rules of Procedures and Order **page 17 – Item A**

A. Comments from the Public

Public comment will be taken in the following order:

An initial ten-minute period of public comment on non-agenda items, after the commencement of the meeting and immediately after Ceremonial Matters and City Manager Comments.

AGENDA ITEM 8

Public comment on the Consent and Information Calendars.

Public comment on action items, appeals and or public hearings as they are taken up under procedures set forth in the sections governing each below.

Public comment on non-agenda items from any speakers who did not speak during the first round of non-agenda public comment at the beginning of the meeting.

Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. A speaker wishing to yield their time shall stand, shall be recognized by the chair, and announce publicly their intention to yield their time. Disabled persons shall have priority seating in the front row of the public seating area.

A member of the public may only speak once at public comment on any single item, unless called upon by the Mayor or a Councilmember to answer a specific inquiry.

Add the following to this section:

The council shall discuss the item after it is introduced, with each Council member stating their current understanding and general thoughts on the item. After council discussion, public comment will be taken. The council will then debate the item, ask any questions of the speakers and make its decision on the matter.

Motion to send added language to the OGC: Metzger

Ayes: Metzger and Saver

MEMO TO FILE

Date/Time: May 9, 2019

Subject: OPEN GOVERNMENT COMMISSION DEMOCRATIC PROJECT
SUBCOMMITTEE MEETING

South Berkeley Senior Center
2939 Ellis Street .
Multi Purpose Room
Secretary:

Special Meeting
May 9, 2019
7:30 p.m.

The Commission may act on any item on this agenda

1. Call to Order 7:30 p.m.
2. Roll Call. Dean Metzger, Brian Tsui, Daniel Saver, Gregory Harper
3. Public Comment.
4 Members of the public present. Steve Martinot for ProDemocracy Project.
4. Chairman and Vice Chair Selection:
 - a. Gregory Harper elected chair, Dean Metzger elected vice chair.
 - b.
5. Committee recognized need to recruit additional members to replace commissioners who will depart in the coming weeks and months:
 - a. Tsui Graduation (Fulbright Ambassador);
 - c. Saver- Family leave (baby)
6. Discussion on organizing the subcommittee:
7. **Management of City Council Meetings**
 - a. Focus is to recommend items to implement governance by dialogue between elected officials and citizens. Discussions of subjects at council meetings is paramount.
 - b. Committee identified and discusses issues raised per the ProDemocracy Project handout.
8. **City Council Meetings and The Consent Calendar - Areas of Concern**
 - a. Very Complex issue
 - i. Limited access to place items on consent calendar
 - b. The Agenda Committee is key and sorely needs attention.
 - i. Oversight is needed.
 - ii. How are issues addressed and placed on the agenda. iii. What is the process and how can citizens have it discussed
 - c. Desire to Maximize the number of speakers.
 - i. Concerns over items being pulled from the agenda or limiting the number of speakers and the time they area allotted.

9. **ACTION ON THE CONSENT CALENDAR ISSUE**
 - a. **MOTION**-Recommend to the city council the mayor or their designate request conduct an informal census/poll to determine the number of persons present for discussion of an item on the consent calendar. If four[4] or more persons are present the item will be moved from the consent to the action calendar.
 - b. **VOTE**- Unanimous approval by members
 - c. **Restructure the Calendar.**
 - i. If a substantial number of people are present for a subject the item should be moved to accommodate the crowd.
 - ii. Presently it is at the mayor's or presider's discretion. iii. The consensus is to make it mandatory
 - iii.
10. What will be the process to accomplish the above?
11. **Speaking Time Concerns**
 - a. Consensus is 2 Minutes is not enough
 - b. Tyranny of the majority
 - i. Take large number of minutes and yield it.
 - ii. Individual or couples are ignored
12. **Agenda Order**
 - a. The Calendar needs restructuring.
13. **Remaining Issues** Insufficient time to discuss:
 - a. Zoning
 - b. Ombudsman
14. **Future meeting schedule**
 - a. June 6, 2019 7:30 P.M. Place TBD
 - b. Adjournment: 9:30 P.M.

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The ProDemocracy Project

For the-initiation of a ProDemocracy Movement that will return the people to policy-making status in city government

Three areas of political process that block people from policy-making.

- 1- City Council procedures
- 2- Neighborhood issues from which local autonomy is highly restricted
- 3- City policy-making from which those to be affected are effectively excluded

1- City government procedures that essentially silence the people.

1- The Loss of Access to Determine the Consent Calendar: Recently, the City Council eliminated the ability of the public, at council sessions, to pull items from the Consent Calendar. For issues or items that the council agrees should be given no time, discussion, or consideration, the public now has no ability to countermand that, or bring it as an issue to the floor. This is one way by which the Council silences the people, by truncating its ability to foster discussion and substance in Council proceedings.

People who come to Council should have the power to pull items off Consent. Council should not have monopoly control over the consent calendar. Instead, if people come to Council to speak on an issue, then they should not have the issue removed from their influence by a consensual council. In other words, the inverse principle should be true. What concerns people, for which they come to Council meetings, must be given respect and priority.

2- Speaking Time: Individuals lose the ability to speak if many show up. In Public Comment, speakers ordinarily have two minutes. But if more than ten desire to speak, each gets only one minute. Time is reduced so that an item doesn't take more time than others. If more than ten people desire to speak on an item, it means that issue is more important than others for which no one wishes to speak. So each speaker should have more than two minutes, and not less. Large public presence for an item would also mean that there are different perspectives on it. One minute is not enough to present a coherent and cohesive argument on a complex question. Reducing speaking time is a way of silencing the people. Allowing more than two minutes to each speaker does not imply that each will take the time allowed. More time should be allowed out of respect for people's desire to participate.

3- The Inflexibility of the Agenda Order: In general, items concerning the well-being of the people, or impositions on neighborhoods by business or corporate interests, and for which many people come to Council to express themselves, are left for late in the session. Business or administrative issues are generally considered first. This is an "anti-people" deferral of an issue. When an issue is set late in the session, many of those concerned in it will have gone home. It is a way of silencing them. The inverse principle should hold. If many people come to Council for an issue, it should be considered early in the meeting. The agenda order should respond to people's involvement. That for which there are the most people should go first. People present should have the power to move items earlier according to their involvement.

4- The "Public Comment" procedure reduces people "faces in the crowd."

In Council discussion, "public comment" comes first, which council manages to sit through, and then council members discuss the item. The public is thus speaking into a vacuum, addressing the issue in disarray, from a variety of unfocused perspectives, without engagement with councilmembers. This produces conceptual confusion and incoherence of idea.

The inverse principle, which should be put in practice, is that Council address the item first, for a specific time-span, speaking about why it exists and what it is designed to accomplish from their various perspectives. Then public comment could address the issue as presented in a more focused way. People could take issue with specific attitudes or stances by councilmembers. Ultimately, some form of dialogue needs to be facilitated between council and the public since policy-making depends on dialogue, and not simply on monologue. As long as the public is only allowed monologue, it is essentially excluded from the policy-making process, and thus silenced.

Council should replace the monologue character of public comment with dialogue through inversion of session phases.

5- A Structure of Flexibility of Format Needs to be Invented

In cases where many people show up to discuss an issue, a shift of format should be possible. To include the people in policy-making, an arena of dialogue and discussion between the public and the council should be possible. For important issues affecting the people and/or the neighborhoods, it is anti-democratic to restrict the people only to monologue (commentary), leaving dialogue to a hermetic Council. One could image a form of townhall meeting in which the dozens of people who come to council to speak on an issue (which isn't rare) would have the ability to enter into dialogue with councilmembers and with each other. Policy does not depend on people speaking to the air. It requires people speaking to each other and exchanging ideas and perspectives. If this occurred prior to council making a final determination on the item, it would be much more democratic. Make procedural format flexible enough to accommodate the people's participation:

In general

- Berkeley City Council has been structured against the public/people having a voice in policy-making. That means *Procedure* takes precedence over *People*.
- In each area, the *people* could be given *priorityover* procedure.

2- Ancillary structural ideas that would put policy making in the people's hands.

A- neighborhood control over zoning (and thus their own neighborhoods)

The zoning regulations of Berkeley are enforced by the Zoning Adjustment Board (ZAB) and controlled by City Council. The Zoning Ordinance works within the city's relationship to corporate finance and the real estate industry. In times of crisis, as in the present, they give only lip service to the specific needs of neighborhoods. Neither the ZAB nor the City Council are attuned to respond to neighborhood concerns about housing development. They hear and ignore, and thus essentially silence the neighborhoods.

- Both city and local zoning regulations (which are enacted by a neighborhood) become conditions to which industry and finance must conform. The people can do this locally by creating Zoning Overlays.
- A Neighborhood Zoning Overlay is a special set of zoning regulations and standards defining neighborhood conditions that are passed by a neighborhood in its own autonomous assembly (A Neighborhood Assembly).
- Zoning Overlays could control how housing development occurs in a neighborhood - corporate vs. non-profit, market rate vs. affordable, etc. For instance, require that any new development should be affordable to people who live in the vicinity of development.
- Neighborhood assemblies could extend their operations to other issues as well, such as stopping displacement of long-term tenants, or defining special community benefits (educational or health benefits).
- **Neighborhood assemblies would become the local policy making bodies for their neighborhood.**

B- an ombudsperson

An ombudsperson is someone to whom one can go to make complaints about a city agency's unethical behavior, and establish a dialogue with that city agency about its comportment or malfeasance. An ombudsperson would act to bring disagreeing parties into dialogue, with the aim goal of undoing unethical city activities.

Such an office is sorely needed. One can't go to City Council since it is a form of silencing. Complaints to the City Clerk will only be addressed as violations of rules or regulations. Yet ethics is an essential element of democratic governance.

What an ombudsperson could do:

- 1- Receive ethics complaints about city staff, police, councilmembers, etc. from residents, and have the power to bring those complaints to council's attention.
- 2- Be an advocate or special conduit for residents or neighborhood groups in dealing with bureaucratic attitudes and procedures.
- 3- Introduce political and economic issues brought by residents into council agendas.
- 4- Assist constituents in finding and using the proper channels or procedures for obtaining city services, and assist in finding out about services.

3- Serious Anti-Democratic Procedures by the city government that have emerged recently, and which violate the fundamental principle of democracy.

The Fundamental Principle of Democracy -Those who will be affected by a policy should be able to participate in making the policy that will affect them:

A second crisis has emerged in California, and thus in Berkeley, the crisis of homelessness. It is ancillary to the housing crisis, but much more dire for those who now form part of the many communities of unhoused people. Federal courts say that the city must let people camp on public land if they cannot provide shelter, but the city has spent time and energy trying to figure out how to harass and torment the homeless, even against those federal conditions.

This has become particularly egregious with respect to those homeless people who live in RVs. Those people have partially housed themselves, and one would expect the city to applaud this. On the contrary, the city has been developing rules and regulations designed to torment and harass them.

The salient fact in all this is that none of the homeless people have ever been included in the process of arriving at rules and regulations concerning them as homeless. From on high, the City Council as an elite makes rules for people who become their victims.

The homeless are able to organize themselves. They have means of pressuring the city into providing primitive and basic services for them as human beings. The hesitancy and refusal to provide those services simply out of a sense of humanity or democracy becomes a mark on the face of Berkeley's government.

The simplest solution

The fundamental principle of democracy holds that the city should bring the homeless together, along with members of the communities in which the homeless find space for themselves, in assemblies of common interest, and have them develop rules and regulations in dialogue with the neighborhoods and with other homeless people.

Democracy is about human beings governing themselves .

The purpose of the ProDemocracy Project is to put policy-making into the hands of people who will be affected by those policies.

Contact us at: PO Box 11842, Berkeley. 510-845-8634 <http://berkeleynativesun.com/>
jpmcfadden925@yahoo.com martinot4@gmail.com

COMMUNICATIONS

Soichet, Emma

From: Steve Martinot <martinot4@gmail.com>
Sent: Monday, June 24, 2019 3:14 PM
To: FCPC (Fair Campaign Practices Commission)
Subject: submission to Open government commission
Attachments: discretionary-despotics.doc

Hi, Emmy,

Would you please see that the members of the Open Government Commission get a copy of the attached article? This is the article I mentioned at the last meeting of the commission in which I propose a Council Oversight Body. Thank you.

Steve Martinot

Discretionary Despotics -- the Failure of the Brown Act

By Steve Martinot

The purpose of the Brown Act (the "Act") is to make government transparent, to ensure that no policy is decided out of public view, and that public "input" is always to be facilitated. It is a democratizing purpose. Its focus is not only that the public be informed of government process, have access to its practices, but also have the right to speak. Under the "Act's" purview, people in official positions, such as Councilmembers or Commissioners, are warned that they must pay attention to their unofficial discussions with each other. Should such discussions inadvertently involve a quorum, it would constitute an unannounced, and thus "un-public" policy-making discussion, in violation of the "Act."

Though the "Act's" goal is an informed public, it does not provide for participation. It does nothing to break the monologic state to which "public comment" is relegated. It also leaves much official procedure discretionary, inviting exotic forms of silencing people. For instance, should the City Council seek to pass an unpopular measure (such as support for Urban Shield – a contemporary "civil defense" boondoggle), it could diminish public input by scheduling the item for late in the session, after many opponents would have left out of fatigue or in the interests of going to work in the morning. Those subjected to such deferral were essentially (and unethically) silenced. Indeed, this happens often enough to convince many people that it is an intentional strategy for constructing agendas. For that reason, many propose that controversial issues be scheduled early, out of respect for those expected to attend.

An egregious example of abuse of discretionary power occurred at the last Berkeley City Council meeting (June 11, 2019). The Mayor arbitrarily and shamelessly changed the scheduled order of an agenda item, deferring it in the face of the many people who were present to speak on it. The malfeasance of that overt move was stounding.

The issue was a receivership the city had imposed on a black family's home in south Berkeley. The owner, a black man named Leonard Powell, had lived in that house for 40 years, raised his family there, and owned it free and clear. When an oddly machinated inspection took place during a falsely warranted police raid in 2014, some 23 Housing Code violations were found. Five different contractors estimated the costs of repair would come to between \$150,000 and \$180,000. The city pretended to provide funding, while secretly misrepresenting the availability to the money, and then falsely claimed Mr. Powell was recalcitrant with respect to the violations. This led to a suit to place the house under receivership. Nine months later, Mr. Powell was saddled with an \$800,000 debt. The racketeers of NYC would have drooled with envy.

The case was finally brought to City Council's attention (on 6/11/19) by two Commission proposals (from Peace and Justice, and Housing Adjustment), dedicated to preventing any such injustice from happening again. Their proposals enumerated basic regulations limiting how the city was to deal with families and housing code violations, while reducing the option of receivership to the level of "last resort".

At the moment this item was to be addressed, the Mayor blithely announced that Council was going to address some business matters (budgetary questions) instead. Needless to say, the clamor of outrage stopped the meeting. It took some fifteen minutes to return Council to

its previously announced agenda ordering. The Brown Act did nothing, at that moment, to guarantee that there would be transparency in governance. We had to win it for ourselves.

This raises the question, what kind of structural changes could be made in Council proceedings that would obviate this form of discretionary despotism? Let's review the Brown Act briefly.

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The underlying purpose of the "Act," for which "transparency" is the metaphor, is to prevent secret deals by elected representatives. It requires that all official decisions occur in public, in well-lighted places, and with sufficient advance notification of time, location, and agenda to allow the public to attend in an informed manner. It thus limits ad hoc discussions that policy-makers can have with each other, prohibiting unofficial meetings in which policy might secretly be decided.

With respect to public participation, the "Act" establishes that speaking time must be allotted for public comment on all agenda items, and that time also be set aside for comment on items not on the agenda. However, it allows each body to set its own standards concerning actual time allotted for each public speaker (e.g. two minutes or three, generally). Though the public must be informed of these standards in advance, the "Act" simply states that they be "reasonable," that is, a balance between the business needs of an official body and the public's desire to participate. "Balance," however, is essentially a pragmatic category, which demotes the ethics of "democratic" procedure to secondary status. It is in violation of those ethics that a Mayor could set an agenda item last if (or because) many people would show up to speak on it. Indeed, the concept of the "reasonable" in the Brown Act is nothing less than a "wildcard" that power can play against the people.

Indeed, though the Mayor can unilaterally change the agenda order, the public, attending the session, has no comparable authority to do so, or even to move an item from the Consent Calendar to Action. Thus, there is a structural disparity in Council proceedings, an inherent imbalance between procedure and ethical principles that is essentially unreasonable.

One glaring example of this imbalance occurs in the form of "decorum" rules which require a public speaker to address only the council body as a whole, rather than specific members. This appears to be common practice for California City Councils. While the motivations of such rules may be to shield delegates from abusive language or personal attacks, prohibiting a person from addressing their own representative in an elected body is not consistent with the Brown Act (let alone with the 1st Amendment). There are now court suits in litigation concerning this issue, and demanding such decorum rules be lifted – in Orange County in particular.

In offering no resolution or recourse for such discretionary imbalances between the people and the Council, the "Act" paradoxically fosters the elitism and insularity that stand opposite participation and transparency.

It also implicitly indicates that the "balance" provided for by the "Act," and the balance that would express a democratic ethics, are wholly distinct. A Council's sense of "balance" between business and public input may act against constituency and social equity as a form of discretionary despotism. In opposition, it would seem that criticism designed to change an official's mind (publicly) and thus their vote, or to reveal a hidden hypocrisy, or enumerate

broken promises, or call out a consistently bad record on certain issues, should all be fair game for public commentary in any elective system.

Indeed, we might point out that Berkeley City Council too often reveals a tendency to adopt dehumanizing (and at times sadistic) ordinances, which it couches as "reasonable." Ordinances punishing or tormenting homeless people for having an RV to sleep in, for instance, or punishing homeless people who set up encampments in order to create community, or ordinances giving the police the power to use stunguns and pepper spray in order to torture people into obedience (technological prohibitions against civil disobedience) have been passed. Representatives who can do this are clearly people who do not think that torture is wrong. The ethical issues at stake need to be raised with them – in public.

In the face of a city government that seemingly cannot refrain from some form of despotic misanthropy (often indicative of backroom deals), we ordinary people have two options. One is to bring about a democratizing change in the rules (and ethics) of council. The other is to organize alternative policy-making bodies.

Two issues

Two issues are raised here. If mayoral prerogative has discretionary power to change the agenda, the ethics of balance is violated by not providing a comparable power for the floor – those who come to provide "input." To the extent to which the rules do not, people are silenced. Under the Brown Act's ethics of democratization, however, one would expect some correction of official discretionary autocracy.

Second, if it is proper for a speaker to address a representative, why would it not be similarly proper for the representative to respond, and thus for the two of them to enter into a brief give-and-take, to wit, delegate reasoning in dialogue with constituent reasoning? Especially since dialogue is the democratic alternative to the subservient compliance of monologue.

Let us look at these possibilities structurally.

On democratizing council prerogatives

In Berkeley, the ethics of silencing the public prevails – through relegation to monologue, and constraint to imposed rules. Though each speaker is offered two minutes to speak, if ten or more people come to speak on an issue, each person gets one minute. This truncates a person's ability to include data or depth of thought in advance. Though others can cede time to a speaker, that simply sacrifices the others's ability to speak – again a form of silencing. Thus, a fully reasoned presentation can only occur through the unethical sacrifice of public participation. In addition, once public comment is over, any public statement is ruled "out of order." Yet, if different groups arrive to advocate or defend specific interests differently, predetermined procedure like this erases the meanings inherent in those differences. In effect, a democracy-oriented ethos has been supplanted by despotic procedure, an absence of respect for the thinking and interests of constituencies.

Democratic procedure, by definition, must enable the people who will be affected by a policy to participate in articulating and deciding (in dialogue) the policy that will affect them. Yet that principle stands in opposition to the alleged "reasonableness" and imbalance of Council's discretionary impositions on the people – such as its ordering of the agenda.

How could an agenda be democratized, that is, foster the "Act's" public purpose? If X number of people come to speak on an item, let that item take precedence on the agenda over

others for which fewer than X number of people have come. That is, let the agenda be flexible in terms of public interest. It would merely require the existence of a body to take a tally of the attendees.

Addressing a specific councilmember cannot be banned under the 1st Amendment. But with respect to policy-making, that is not enough. Policy always involves dialogue, implying that constraint to monologue both silences and excludes. If individual Councilmembers are to be addressed, whether to criticize or to convince, the one addressed should have to be able to respond. Dialogue, even at that molecular level, must be in accord with the "Act." And certain benefits would immediately accrue. It would break the structure of elitism while establishing a new equity in governance. The question it raises would concern regulation – how to keep it from becoming a full-scale discussion?

In effect, the balancing of Council vs. public interests, the democratization of the agenda, and the extension of the ability of public speakers to address specific officials in molecular dialogue, present a City Council with both organizational and ethical issues.

Let us consider a body charged with overseeing the ethical legitimacy of such an expansion of participation in Council, a body focused on ethics, and thus independent of predetermined rules and procedures. Let us call it a "Council Oversight Body," and give it referee status over imbalances between Council business and the public's desire for significance. Its focus would be the implementation of principled democratic political process, as a body charged with the ability to ethically judge the "reasonable," in the spirit of the "Act." Concepts of decorum, time allotments for speakers, dialogic input between speakers and the Council as called for by the particular character of each Council session (constituency interest, attendance, controversy of topic, etc.) would all come under its purview.

A representative of such a body would sit on Council, off to the side in the company of the Manager and the City Attorney, and act to preserve the ethics of representation, the responsibility of representatives to constituents, and the maintenance of an open environment for the expression of ideas and interests.

A Council Review Commission

One more step is needed to correct for the extent to which the "Act" permits discretionary despotism – a Council Review Commission (CRC). Analogous to the Police Review Commission, it would be a venue in which proposals for further restructuring and democratizing City Council could be voiced and discussed. Its purpose would be to critique and judge Council rules and operations, and discuss how to establish greater dialogue in the political process. Its meetings would themselves be a mode of public participation in the political process.

While the PRC needs official status because the police are a closed institution, a CRC would not, since Council and the Commissions are open. A CRC could meet and be at liberty to propose things on an autonomous basis. It could independently judge, as a venue for public discussion, the extent to which the Council was resistant to forms of democratization or not.

Its meetings would be open to the public for both input and dialogue on issues of City Council procedures and ethics. It would thus represent a degree of popular determination of how government should function, an actual venue for feedback based on dialogue, and about the institution of dialogue in actual governance.