

COALITION OF RETAILERS

October 13, 2010

Honorable Ronald Irish, Mayor
Honorable Members of the Council
City of Porterville
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RE: Substantial Violation of a Central Provision of the Ralph M. Brown Act

Dear Mayor Irish and Honorable Members of the City Council:

The *Coalition of Retailers* is a group of civic minded business owners operating in and around the City of Porterville. As business owners we have a significant vested interest in the future developments of the City of Porterville ("City"). We have followed the recent actions of the City Council with regards to the development of the Cooperative Agreement with the Tule River Indian Tribe ("Tribe"). We have reviewed and cited within this letter directly from the Attorney General of the State of California's publication, "*The Brown Act, Open Meetings for Local Legislative Bodies*"¹, prepared by the Division of Civil Law, Chief Assistant Attorney General Andrea Lynn Hoch and Deputy Attorney General Ted Prim. (2003)

We write today to call your attention to what we believe is a substantial violation of a central provision of the Ralph M. Brown Act. This action jeopardizes the final approval of the Memorandum of Understanding ("MOU") between the City and the Tribe for the 40 acre fee-to-trust acquisition: (1) The approval of the MOU between the City and the Tribe on March 16, 2010 in closed session does not meet the statutory definition of matters appropriate for closed session (2) The MOU between the City and the Tribe was not noticed on the March 16, 2010 agenda, and (3) closed session item subjects must provide the public the opportunity for comment prior to the City taking an action Section 54957.7(a).

¹ *The Brown Act, Open Meetings for Local Legislative Bodies*¹, prepared by the Division of Civil Law, Chief Assistant Attorney General Andrea Lynn Hoch and Deputy Attorney General Ted Prim. (2003)
http://www.ag.ca.gov/publications/2003_Intro_BrownAct.pdf

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The City agenda of March 16, 2010², lists several items for discussion in closed session. However, the MOU between the City and the Tribe is not listed on the March 16, 2010, agenda in the closed session items. Nor is the MOU listed elsewhere on the agenda. More importantly, an MOU between the City and the Tribe does not meet the statutory definition of matters appropriate for closed session.

The approval of the MOU in closed session³ is not in compliance with the Brown Act because there was no adequate notice to the public on the posted agenda for the meeting that the matter was to be acted upon or would be discussed. Further, there was no finding of fact made by the City Council that urgent action⁴ was necessary on a matter unforeseen at the time the March 16, 2010, agenda was posted.

The Brown Act requires under section 54954.2, subdivision (a), the legislative body must post an agenda containing a “brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session,” and no action or discussion shall be undertaken on any item not appearing on the posted agenda.... *Shapiro v. San Diego City Council, supra*, 96 Cal. App. 4th 904, 923.

The City is required prior to meeting in closed session to orally announce that the MOU would be discussed in closed session (54957.7(a)). The City is required to report on any closed session final decisions, (54957.1).

On the April 20, 2010 agenda⁴, item #10 is listed as “Report only, no action”. This is the first time the City provides the public knowledge of the approval by the City Council on March 16, 2010, of the cooperative agreement which is later approved by the Tribe and becomes effective as of April 1, 2010. The March 16, 2010, meeting minutes are attached to the April 20, 2010 agenda in which City Attorney Julia Lew reported: “7 P.M. Reconvene Open Session, that no action took place”. At page 1 of the Meeting Minutes for March 16, 2010, Attorney Lew’s statement is contrary to what is reported in the first paragraph of the April 20, 2010 Agenda, item #10 Report. ***Attached is the cooperative agreement approved during its closed session on March 16, 2010, and approved by the Tule River Indian Tribal Council at its meeting on April 1, 2010.***⁵

The purposes of the Brown Act are to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken. (See *Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 373, 375;*

² <http://web.ci.porterville.ca.us/govt/agendas/attachments/2010-03-16%20Full%20Agenda.pdf>

³ As reported in the very first paragraph of the Report, item #10 on the April 20, 2010 Agenda, “Attached is the cooperative agreement approved during its closed session on March 16, 2010, and approved by the Tule River Indian Tribal Council at its meeting on April 1, 2010.”

⁴ <http://web.ci.porterville.ca.us/govt/agendas/attachments/2010-04-20%20Full%20Agenda.pdf>

⁵ *City, Tribe draw framework for collaboration*, by Jenna Chandler the Porterville Record, April 17, 2010. “...cooperation agreement was approved by the City Council behind closed doors March 16 ...”

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Frazer v. Dixon Unified School Dist. (1993) 18 Cal.App.4th 781, 795-797; Stockton Newspaper, Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95, 100; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 45.)

“The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision’.” [Citation.]” (*Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234; see Roberts v. City of Palmdale, supra, 5 Cal.4th at p. 376.*)

The MOU between the City and the Tribe was then and is now an inappropriate topic for a closed session item. Closed session meetings are specifically defined and are limited in scope. They primarily involve personnel issues, pending litigation, labor negotiations and real property acquisitions, sections (54956.8, 54956.9, 54957, 54957.6,). The Brown Act only provides for “closed sessions” or “executive sessions,” in the following circumstances:

- (1) To determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license
- (2) To with its negotiator to grant authority regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property
- (3) To confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation
- (4) To meet with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, or a threat to the public's right of access to public services or public facilities
- (5) To consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee;
- (6) To meet with the local agency's designated representatives regarding the salaries, salary schedules, or fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.

The ***Coalition of Retailers*** demands that the Porterville City Council cure and correct this violation of an ‘action taken’ as follows:

- 1) Rescind the MOU approved in closed session on March 16, 2010
- 2) Issue a full report of the executive session of March 16, 2010
- 3) Provide any and all documents, transcripts, texts, notes, related to the action taken on MOU March 16, 2010, which shall also be made available to the public at the time of notice of the city council meeting as outlined in item 4 below.

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- 4) Place and rehear the MOU as it was indicated to originally appear on the March 16, 2010 city council agenda on a subsequent city council agenda not to exceed 60 days from this demand and provide full notice to the public and to the *Coalition of Retailers*.
- 5) Require all city council members in attendance on March 16, 2010 to explain their positions and reasons as to why:
- a.) Explain how the MOU conforms to the statutory definition of an appropriate topic for closed session?
 - b.) Why the MOU was not listed on the Agenda of March 16, 2010 in closed items so that the public could comment prior to the action of the City council?
 - c.) Why there was not an announcement prior to the action or immediately following the action taken in closed session on March 16, 2010?
 - d.) Why did the city Attorney report that no action had been taken during closed session in the meeting minutes of March 16, 2010?
 - e.) Why did the City wait more than a month to simply issue a Report in the April 20, 2010 Agenda which specifically states the Council had taken an action to approve the MOU between the City and the Tribe and that it was in effect as of April 1, 2010?

As provided by Section 54960.1 of the Brown Act, you have 30 days from the receipt of this demand to either cure or correct the challenged action or inform our *Coalition of Retailers* of your decision not to do so. As you know, failure to cure or correct as demanded, exposes the City to potential judicial invalidation should this action be challenged pursuant to Section 54960.1 of the Brown Act. It should be noted that the Brown Act provides in Section 54960.5 that upon invalidation of the action court costs and fees are awarded to the plaintiff.

Moreover, violation of the Brown Act is both a civil and criminal offence. The Act provides criminal misdemeanor penalties for certain violations. Specifically, the Act punishes attendance by a member of a body at a meeting where action is taken in violation 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, section (54959.)

The term "action taken" as defined by section 54952.6 includes a collective decision, commitment or promise by a majority of the members of a body. The fact that the decision is tentative rather than final does not shield participants from criminal liability; whether "action within the meaning of the statute was taken would be a factual question in each case". (*61 Ops.Cal.Atty.Gen. 283, 292-293 (1978)*). In this instance, not only does the City record document an "action taken", it is also reported in a newspaper of general circulation.

In the event it appears that the conduct of the City specified herein did not amount to the "taking of action" we call your attention to Section 54952.6 of the Brown Act, which defines "action

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taken” for the purposes of the Act expansively, i.e. as “a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.”

We await your timely response.

Sincerely,



Taha Saleh
PH: 559 781-1850



George Kassab
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CC: Honorable Arnold Schwarzenegger, Governor of California, Fax: (916) 323-0935
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