

July 28, 2020, Council Agenda Comments

The following comments on items on the Newport Beach City Council [agenda](#) are submitted by:

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Item 1. Minutes for the July 1, 2020 City Council Emergency Meeting and July 14, 2020 Regular Meeting

Comment: As indicated by this item's title, of the two sets of minutes being presented for approval, the first is for an "emergency" meeting held on [July 1](#).

California's open meetings law, the [Brown Act](#), allows emergency meetings to be held with as little as one hour's notice (less in a "dire" emergency) to the media (and none to the public in general).

July 1 was the Council's second "emergency" meeting in recent times -- the other, and possibly the *only* other emergency meeting in the City's history,¹ having been held on [April 30](#).

As [previously noted](#), Government Code [Section 54956.5\(e\)](#) requires summary minutes of an emergency meeting to be prepared and publicly posted "*as soon after the meeting as possible*." The present first posting of minutes on Thursday, July 23, clearly does not comply with that.

Second, and more importantly, Government Code Section 54956.5(a)(1) prevents an emergency meeting from proceeding without a finding by a majority of the Council that an emergency necessitating a meeting with so little notice indeed exists.

Although the Newport Beach City Council complied with that requirement on April 30, neither the present lately-posted minutes nor the [video](#) of the July 1 meeting confirm any such vote was taken.

Had such a vote been taken, it is doubtful it could have been justified:

1. The July 1 meeting was ostensibly called to consider closing the City's beaches, two days later, as a result of a possible shortage of lifeguards.
2. As the Mayor pointed out (end of page 463 of the draft minutes), the Council's Declaration of Emergency ([Resolution No. 2020-25](#)) adopted at the March 18, 2020, special meeting *already* authorized the City Manager to take all the actions being contemplated without further concurrence by the Council, so this was, in fact, more of a non-urgent "receive and file" informational meeting.
3. As indicated at the top of page 463, despite the Mayor and City Manager's concern, the City's Chief Lifeguard did not foresee a problem that would require a beach closure.

In any event, **the absence of a public vote by the entire Council to confirm the need for an emergency meeting existed, and the public reporting of that vote in action minutes**

¹ The fact that two emergency meetings were held in 2020 will be difficult to decipher in the future since the April 30 and July 1 meetings are listed in the City's [Laserfiche archive](#) of past meetings as "Special Meetings." Special meetings ([Gov. Code Sec. 54956](#)) are something different, held with at least 24-hours posted notice to the entire public.

posted immediately after the meeting, means the entire July 1 meeting was held in violation of state law.

Suggested corrections: The passages shown in *italics* below are from the [draft minutes](#) with suggested corrections indicated in **strikeout underline** format. The page numbers refer to Volume 64.

Page 464, paragraph 4, sentence 2: *“He did not see how closing the beaches would cause **anymore any more** issues than the City would normally have and believed it would be safer to close the beaches.”*

Page 464, paragraph 6: *“Dr. **White Weiss** discussed the difficulty of trying to go to the water’s edge while staying 6 feet away from people, ...”* [although the quality of the phone connection was poor, this certainly appeared to be [Dr. Richard Weiss](#), husband of Portia Weiss (whose comments appear on page 466)]

Page 469, Item VI, paragraph 2: *“Jim Mosher, addressing Items 3 and 4, stated he was surprised that the new **guidelines definition** of short-term lodging **as “less than 30 days” was were** being enacted without discussion, indicated City Council Policy A-1 sets the Council’s meeting time at 7:00 p.m. while Item 4 will set the meeting time at 4:00 p.m., shared a history of the Council meeting time, and believed Item 4 ignores history, precedent, and the public.”²*

Page 472, before Item 7: *“Council Member Brenner recused herself on Item 6 due to real property interest conflicts; and Council Member Muldoon recused himself on Item 6 due to business interest conflicts.”*

Comment: The minutes accurately reflect what was said, but it might be noted that recusals in Newport Beach rarely meet the minimum disclosure requirements of [FPPC Regulation 18707](#), either as that regulation was [recently amended](#) or as it [previously existed](#). That regulation requires, in the case of real property conflicts, public disclosure of the **address** of the conflicting property (or, if the official’s principal residence, a statement that it is); and in the case of business conflicts, the **name** of the conflicting business entity and the official’s **interest** in it.

Page 477, paragraph 3: *“Council Member Brenner asked Fire Chief Boyles to inform the children about safe social distancing guidelines and encourage them to **wearing wear** face coverings both to and from the Junior Lifeguard Program.”*

² As a further example of City staff’s inability to understand that “less than 30 days” is not the same as “30 days or less” (the old definition of STL), at the July 23, 2020, Planning Commission meeting, in reviewing the Council’s prior discussions of short-term lodging regulation possibilities, Director Jurjis presented a slide with this message highlighted in red: **“Short-term lodging 30 days or less is not a Property Right”** (see [video](#) at 26:00). Yet under the ordinance whose adoption is memorialized in these minutes, limiting short-term regulations to “less than 30 days,” a 30 day rental now is, apparently, a property right.

Item 4. Resolution No. 2020-71: Second Addendum to the Uptown Newport EIR to Modify Mitigation Measures

This seems like a matter requiring special scrutiny, and not hidden on the consent calendar, since it will most impact the future residents of Newport Beach who will be living immediately adjacent to the ammonia tank, but who (because they don't live there yet) are not able to voice their own possible concerns about it.

While our City Fire Marshal is likely correct that this proposal is better than the existing mitigation measure, shouldn't it be reviewed by the Planning Commission since they are the ones who originally recommended certification of the EIR, including the original mitigation measures (see [Item 5](#) from their December 6, 2012, meeting)?

Item 7. Amendment No. Three to Agreement between the City of Newport Beach and Hoag Hospital for the Delivery of Natural Gas

In the Clerk's [contracts database](#), the existing agreement ([C-2493](#)) is misfiled as having expired on "7/1/2010" and therefore being "inactive." However, the text confirms the statement in the staff report that the 2010 amendment extended it to August 1, 2020.

One has to closely read the "Recitals" section of Attachment A to realize that what was for its first 22 years an agreement to *sell* the City's excess natural gas to Hoag Hospital (see [Item 13](#) from May 13, 2003) morphed on August 1, 2007 (see [Item 7](#) from April 22, 2008) into a supposedly stop-gap measure to "deliver" gas to Hoag at no cost. This happened when Hoag claimed they had discovered their agreement with SoCal Gas prohibited them from buying gas from any other source.

The agreement extensions since 2007 have supposedly been to give staff time to develop alternative uses for the gas. As earlier staff reports have indicated, those might include self-powering oil field operations or fueling City vehicles (or, one has to wonder, could it not be conditioned and sold into the [SoCal Gas grid](#), as I believe CR&R does with their anaerobic digester?).

After 13 years, shouldn't those alternative uses have been explored and implemented?

Without any discussion of alternatives, costs and potential revenues, the staff reports assurance that "*The agreement continues to provide a cost effective manner to remove excess natural gas*" is completely unconvincing. Surely giving the excess gas away is not a good deal for the City in the long run. And if it is regarded as a taxpayer subsidy to Hoag, it should be recognized as such and a value put on it.

As to the Recommendations, part "c)", authorizing to City Manager to "grant extensions up to five additional years" seems poorly thought out:

1. It is not mentioned in the Agreement, so the source of that authority could easily be forgotten.

2. Since it is not formally part of the Agreement, it is unclear if the five years, limits the extensions to August 1, 2025 (a total extension of five years from now) or August 1, 2027 (the Council grant extension plus five, for a total of seven years).
3. Nothing in the recommendation directs the City Manager to actively pursue the alternatives that have been promised for the last 13 years.

Item 9. Planning Commission Agenda for the July 23, 2020 Meeting

As indicated in the posted [action report](#), on July 23, the Planning Commission was asked to make a recommendation regarding a “Phase 2” to the City’s short-term lodging revision process, which consisted of [proposed amendments](#) to our Local Coastal Program Implementation Plan.

The PC was told this would be their only involvement with the STL matter, Phases 1 and 3 not requiring their review. Oddly, and apparently unknown to the PC, their hearing did not correspond to the work plan presented to the Council in Item 19 on June 23. The staff report from that meeting said that before proceeding the Phase 3, the Council ad hoc committee wanted PC recommendations on: (1) on-site parking requirements, (2) maximum unit occupant load, and (3) a limitation on the number of permits issued.

Although the PC was told the Council’s recently-adopted [Ordinance No. 2020-15](#) (“Phase 1”) required all onsite parking to be made available for STL guests and that those guests be required to fully use that parking before using any on-street parking, the PC was *not* asked to make any recommendation regarding parking (such as whether to establish a required minimum number of onsite spaces).

Similarly, the ordinance presented to the PC, like Ordinance No. 2020-15, limited occupancy to “*the maximum permitted by the Building Code and Fire Code*,” but the PC was *not* asked to make a recommendation regarding adopting, instead, a “*two people per bedroom plus two additional people*” standard – despite the Council (and public) having been told, on June 23, that the PC would be asked that.

What the PC did understand it was being asked to make recommendations about was minimum night stay requirements and limiting the total number of permits (either with a cap on the total number or prohibiting new permits)—two policy questions a majority of the Planning Commissioners seemed to feel were outside their land use expertise (see [video](#) at 2:54:40).

Item 10. Fiscal Year 2019-20 Annual District Discretionary Grant Report and the Quarter Ending June 30, 2020 Grants and Donations Report

As to the “District Discretionary Grants,” I have long thought this [Policy A-12](#) program of giving each Council member \$6,000 (or any other amount) to spend as they choose is contrary to the City Charter’s [Article IV](#) vision of the council as a body that acts only collectively, not as individuals. It is also, in my view, contrary to the Charter’s vision of the Council members being

elected *from* districts, but not having any special powers or obligations related to “their” district (that is, to ensure geographic diversity, we have a *residency* requirement, only).

I am, therefore, pleased to see Mayor O’Neill and Mayor Pro Tem Avery chose to return “their” \$6,000 to the General Fund. And that Council member Muldoon did the same with \$5,000 of “his” – although I had to use Google to guess the \$1,000 he gave to “PORAC” went to the [Peace Officers Research Association of California](#).

One has to wonder if these District Discretionary Grants are accompanied by any contractual or reporting requirements as would a “normal” City grant? My guess is they are not, and they are simple cash gifts to be used however the recipient wishes.

As to the quarterly Grants and Donations Report, it is not entirely clear from the staff report if the \$7,500 donation reported from the Little Balboa Island Property Owner Association represents a cash donation to be used by the City for “Landscape and streetscape improvements on Balboa Island,” or if represents the in-kind value of improvement work undertaken by the association. I would guess it is the former, but I don’t know.

Item 11. Visit Newport Beach, Inc. FY 2021 & FY 2022 Destination Business Plan and Budgets, and FY 2020 Performance Standards Report

On January 14, 2020 (see [Item 21a](#)), the Council appointed a City representative to the VNB Executive Committee. Especially since that position arose in response to suspicions of mismanagement of money, it would seem helpful to hear that person’s perspective on this. But if that has been communicated to the Council, it is not reflected in the current report.

As previously noted, when considering this budget it should be appreciated that the VNB board sanctions paying the organization’s CEO very handsomely. According to page 17 their [federal tax return](#) for what appears to be the fiscal year ending June 30, 2019,³ Mr. Sherwin consumed some \$311,782 + \$55,201 of the taxpayer dollars given to the organization, for a total of \$366,983 per year. I believe that is more than our City Manager’s combined salary plus benefits for managing a much larger organization, as well as a significant fraction of the VNB budget.

It might be comforting to see from the budgets being presented for approval on page 11-37 of the staff report that no salary or benefit expenses are anticipated for the next two years. But I don’t think that’s how these budgets work. Instead, I think most of the money given to VNB disappears into the “NB&Co fees” item on the following page, where Mr. Sherwin and others are paid out of a separate Newport Beach & Company budget that may not be seen by either the City Council or its VNB representative.⁴ Certainly it is not included here, making it difficult to know what is being approved.

³ From the IRS "[Tax Exempt Organizations Search](#)" site.

⁴ Hopefully Ms. Wood *does* see it. Page 11-31 indicates the VNB Executive Committee to which she was appointed is also the NB&Co Executive Committee.

Item 12. Confirmation of Voting Delegate and Alternates for the 2020 League of California Cities Annual Conference

1. Does the statement under “Funding Requirements” on page 1 of the staff report that “*There is no fiscal impact related to this item*” mean there is no cost to the City? Or that the cost is already in the budget?
2. It is interesting that while our staff report anticipates “*an all virtual conference*,” the attached materials from the League and their [online calendar](#) continue to reference a Long Beach location.

Item 13. Ordinance No. 2020-16: Two-Year Extension to the Hoag Development Agreement (PA2020-065)

As indicated in the staff report and ordinance, the Planning Commission conducted a public hearing on this matter on July 9, 2020. In the disclosure of ex parte communications that accompanied that hearing, three of the Commissioners said they had been contacted by “the applicant’s consultant” (see [video](#) at 22:04). None of them indicated who that consultant was, and the one who apparently had a conversation did not disclose what she had been told. Of the currently registered lobbyists, two indicate they represent Hoag: [Delta Partners](#) (David Ellis) and [Government Solutions](#) (Coralee Newman) although neither indicates what specific issues they representing Hoag for.

As to the request, the idea that the distraction of COVID-19 delayed Hoag from considering their development plans seems contradicted by the reports the public has heard at Council meetings that Hoag has, to date, been underwhelmed with COVID patients. It seems more likely to me that they would want time to rethink their plans in view of likely changes in consumer behavior patterns in accessing medical care in the future.

Item 14. Ordinance No. 2020-17: Zoning Code and LCP Amendments Related to Corrections, Clarifications, and Inconsistencies (PA2019-055)

Although not explained in the staff report, it appears from Attachment C that the present package addresses only a portion of the topics initiated by City Council Resolution No. 2019-41.

Also not mentioned is that I submitted some [suggested modifications](#) when this was before the Planning Commission as Item 5 on June 18, 2020, none of which, at least according to the minutes, were accepted.⁵

⁵ The redlines starting on page 14-25 of the current staff report do not, in all respects, match those [presented to](#) and approved by the Planning Commission, suggesting the discussion there stimulated some changes. And some of the changes made to the existing code are not reflected in the redlines. Compare, for example, the Planning Commission recommended amendments on page 14-42 to the version being proposed for Council adoption on page 14-8. Although they appear to implement only one of my suggestions, some of the inconsistencies in the code pointed out on June 18 seem to have been

As to the [Title 20](#) amendments, I continue to think, as explained in my written comments to the PC, that the lengthy addition to [Section 20.66.30](#) (as proposed on pages 14-9 through 14-11) are largely unnecessary.

As to the [Title 21](#) amendments, I continue to think, as I attempted to convey orally to the Planning Commission, that the new footnotes to [Tables 21.18-2](#) through 21.18-4, proposed on pages 14-18 through 14-19, are misplaced. They refer not just to lot area, but to width and depth (referred to as “length” in the footnote). So they belong in the “Lot Dimensions” box seen on page 14-19, not the “Lot Area” one. I also continue to suspect the footnotes should refer to [Section 21.30.25](#), the LCP-IP rules for subdivision, rather than [Title 19](#).

Item 15. Resolution No. 2020-73: Intent to Override the Airport Land Use Commission Finding of Inconsistency for the Newport Airport Village Project (PA2014-225)

I found it embarrassing that the notice of this hearing, and the City’s intent to override the ALUC’s decision, was posted before the ALUC had made its decision.

In that connection, I think it would be good to clarify who initiated the push to override and who is paying for it. Is it the private developer? Or has the City taken up the cause of advocating for them?

Additionally, the question of liability always comes up in matters like this, but is not (as best I can tell) addressed in the staff report. Page 15-10 assures us “[Public Utilities Code Section 21678](#) states that if the City overrides ALUC’s action or recommendation, the operator of the airport shall be immune from liability from damages to property or personal injury caused by or resulting directly or indirectly from the City’s decision to overrule the ALUC determination.” But if the operator of the airport is absolved of liability, one has to assume the liability for approving something they felt was unwise and unsafe moves to the City.

Item XX. MOTION FOR RECONSIDERATION

I strongly recommend the Council reconsider its consent calendar action on [Item 4](#) at the July 14 meeting to amend [City Council Policy A-1](#) to change the start time of the Council’s regular business meetings from 7:00 p.m. to 4:00 p.m.

That the vote on such an important and problematic matter was taken without any prior public announcement that such a move was being considered and without any public discussion

corrected in the online code prior to the approval of any changes to it. For example, [NBMC 20.28.10.D](#) no longer looks as it did: “Height (H) Overlay District” (as adopted by [Ordinance No. 2015-12](#)) has been changed to “H (Height) Overlay District” (as proposed here), and “Bluff (B) Overlay District” (as adopted by [Ordinance No. 2010-21](#)) has been changed to “B (Bluff) Overlay District”. While I appreciate these changes made in response to my observations, and minor as they may seem, I don’t think they should have been made until the present action correcting them was actually adopted.

suggests the Council members had previously discussed the matter among themselves and reached agreement outside any public forum.

The absence of any public discussion of either the problem that needed to be solved, or alternative solutions to it, was deeply troubling, particularly in view of the Council's only previous experiment with 4:00 p.m. business meetings⁶ having been abandoned when the need for them ended.

The misrepresentations of what was actually approved is also disturbing.

Setting the appearance of a Brown Act violation aside, the purported reasons for this change as later explained by the Mayor were:

1. The phone-in option for public comment has markedly increased public participation and greatly increased the length of Council meetings.
2. Bad decisions are made when the meetings run to or past 11:00 p.m.

As to the first point, my impression for the increase in public comment is that is the result not of the phone-in option but rather of the hot-button nature of two recent discussion items: beach closures and short term rentals.

Indeed, my impression is the transition to virtual meetings has caused a marked decrease in public participation.

As to the second point, the reason for the bad decisions is not the hour, but the length of the meetings that precede the 11:00 p.m. hour. That length has resulted from City's staff inability to schedule the afternoon study sessions such that there will be a sizeable break between those and the evening meeting, and instead running continuously without any break.

Instead of correcting that problem by reverting to holding study sessions at a much earlier hour in the afternoon to ensure at least a two- or three-hour rest (as was the City's practice when they were first held), or even on a separate day (as some other cities do), the July 14 action institutionalizes the problem: *all* meetings will now be marathon meetings running without any predictable break (at least for the public) from 4:00 p.m. till whenever.

Another obvious possible solution (also practiced in Newport Beach in the past) is, when necessary, adjourning overly-long evening meetings to a special meeting on a later evening.

As to the misrepresentations:

1. I have heard it said that what the Council has actually adopted is 4:00 p.m. closed or study sessions followed by 5:00 p.m. business meetings (as the present meeting is scheduled). This is not what page 2 of the adopted policy says. In the absence of a closed or study session, it instructs staff to schedule the regular meeting for 4:00 p.m., and in their presence, to start it as soon as they end. There is no mention of 5:00 p.m.

⁶ I documented the history of the start hour for Newport Beach Council meetings in my [written comments to Item 4](#) on July 14. In summary, residents could generally expect the City's regular business to be transacted at or after 7:30 p.m. from the City's creation in 1906 until 1990, when the hour was changed to 7:00 p.m. The previous experiment with 4:00 p.m. business meetings, started in 1942 in response to World War II black-out regulations, was abandoned in 1948.

2. I have also heard it said by certain Council members that they have researched the matter and found that meeting at 7:00 p.m. made Newport Beach an extreme outlier, with almost all other city councils in Orange County meeting earlier in the day. This is incorrect.

While it is true that the city council in [Santa Barbara](#), a California city of comparable size, transacts its regular business at 2:00 p.m. every Tuesday, the only Orange County city council to meet at 2:00 p.m. is tiny [Laguna Woods](#), and the only one (other than, now, Newport Beach) to convene at 4:00 p.m. is [Irvine](#). All others hold their regular meetings at 5:00 p.m. or later with 9 of the 34 councils meeting at 7:00 p.m.⁷

A complete list of the start hours for the regular business meetings of the 34 Orange County city councils follows. Newport Beach was not formerly an outlier. It is now:

⁷ The number of Orange County city councils holding their business meetings at 7:00 p.m. was formerly 11. [Tustin](#) temporarily moved their start time from 7:00 to 5:00 p.m. in response to the COVID-19 emergency, for which they sensed a need for more items. They had also planned to meet weekly, but found that unnecessary, and seem to have recently switched to meeting at 4:30 for closed session and 5:30 for their regular business meetings. With Newport Beach moving to 4:00 p.m. and Tustin still uncertain, the number of OC cities holding their business meetings at 7:00 p.m. has thus dropped from 11 to 9.

City	Start hour
Aliso Viejo	7:00
Brea	7:00
La Palma	7:00
Laguna Hills	7:00
Laguna Niguel	7:00
Placentia	7:00
Rancho Santa Margarita	7:00
Seal Beach	7:00
Westminster	7:00
Fullerton	6:30
Garden Grove	6:30
La Habra	6:30
Lake Forest	6:30
Stanton	6:30
Villa Park	6:30
Yorba Linda	6:30
Costa Mesa	6:00
Dana Point	6:00
Fountain Valley	6:00
Huntington Beach	6:00
Los Alamitos	6:00
Mission Viejo	6:00
Orange	6:00
San Clemente	6:00
Santa Ana	5:45
Anaheim	5:00
Buena Park	5:00
Cypress	5:00
Laguna Beach	5:00
San Juan Capistrano	5:00
Tustin	5:00
Irvine	4:00
Newport Beach	4:00
Laguna Woods	2:00