

October 12, 2021, City Council Agenda Comments

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

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► **Note:** comments on **Item XIII** (the possible future “Elect Our Mayor” agenda item) have been placed, out of sequence, at the end.

Item 1. Minutes for the September 28, 2021 City Council Regular Meeting

The passages shown in *italics* below are from the [draft minutes](#) with suggested corrections shown in ~~strikeout~~ underline format. The page numbers refer to Volume 65.

Page 143, Item SS2, paragraph 1: “*Newport Beach Arts Foundation President Juanita Holley presented Mayor Avery with a \$20,000 check, noted a recent celebration of ~~Phase VII~~ of the Sculpture Garden which this continues for Phase VII, and thanked Library Services Director Hetherton for his work with cultural arts.*”

[See [video](#). The [celebration referred to](#) (also mentioned later in the Council member announcements on page 146) was in connection with the Grand Opening of Phases V and VI, not VII. Ms. Holley said the gift was a continuation of that celebration to benefit Phase VII (Item 12 on page 149).]

Page 144, paragraph 7: “~~*With Mayor Pro Tem Muldoon voting “no,” there was a 6-1 straw vote for authorization to negotiate a 50/50 split with a \$6.5 million cap.*~~”

[This one-sentence paragraph is printed twice.]

Item 5. Resolution No. 2021-95: Request for Petition Certification and Funding for Expanding Underground Assessment District No. 120-2 (Santa Ana Avenue and Cliff Drive Area)

I am little confused by the staff report and proposed resolution.

The last “Whereas” of the resolution on page 5-4 (which is not provided in machine-readable format) says “*in the event the new assessment district is formed, the City Council would dissolve AD 120.*”

But, as the staff report acknowledges, on April 13, with [87.22%](#) of the assessment valuation voting in favor, AD 120 was formed and the sale of bonds to cover its cost authorized ([Item 15](#)). Those voting had a reasonable expectation their project would move forward at an agreed upon cost.

Does the present action bring all that to a halt? Does it mean the original 23 participants may now face (as the first sentence of the last paragraph under “Fiscal Impact” on page 5-3 implies they will) a recalculated assessment based on including the 19 new participants at a cost that could be lower or higher? If so, do they have to agree to the change (especially if the new assessment is higher)?

Item 8. Police Station Locker Room Remodel - Notice of Completion for Contract No. 7872-1 (21F12)

The table near the top of page 8-2 makes no sense, at least to me.

Normally the “Final Contract Cost” (under the line) is the sum of the two lines above it: the “Actual Cost of Bid Items Constructed” (which is normally less than the “Original bid amount”) as corrected by adding the “Total Change Orders.”

In this case, if the final cost, after adding \$72,075.73 in change orders, was \$834,075.73, it would seem the City must have paid $\$834,075.73 - \$72,075.73 = \$762,000.00$ on bid items constructed – which would be remarkable since it matches the contract award amount to the penny.

The report is similarly confusing in describing how the City Manager increased the Council-approved 10% contingency (\$78,000 approved as part of [Item 7](#) on February 9, 2021) to 12.9%, when according to the report the actual contingency paid was 9.46%, which was within the Council’s originally-granted authority. Why was the intervention by the City Manager necessary?

Item 9. Civic Center Park Pathway Replacement - Notice of Completion for Contract No. 7879-1 (21P12)

It is evident from the staff report that City staff is not at all happy with the performance of this contractor.

Yet, in awarding the contract as [Item 7](#) on the September 22, 2020, consent calendar, the Council was assured “*A check of the contractor’s references indicates satisfactory completion of similar projects for other local public agencies.*”

Is a mechanism in place to prevent Civic Construction Associates from being awarded future City contracts even if they are the low bidder, as they were here?

Also, in the table at the bottom of the first page, the **3.33%** “% Due to Directed Change” seems to be a **-3.33%**, representing the difference between the final amount paid and the contract award price (not including contingencies).

In this connection, the report does not seem to mention that Council’s award in 2020 included a 20% (\$31,000) contingency intended to cover extra work around the Dog Park that staff anticipated asking Civic Construction Associates to perform given their lower-than-expected bid. Evidently that work did not take place?

Item 13. Planning Commission Agenda for the October 7, 2021 Meeting

There was a time when the Council received an oral report from the City’s Planning Director on the Planning Commission’s most recent activities.

The present cryptic written notes the Council receives and files will not disclose that as part of the review of [Item 3](#) on the October 7 agenda (an Airport Area planned community text amendment that will later be coming to the Council), the PC Vice Chair asked about Table 1 on

handwritten page 7 of the report, which purported to show “*the Airport Area projected to add 2,543 residential units*” [a number, incidentally, greater than the 2,200 maximum approved by voters in 2006 and still the limit in the General Plan].

Since the addition of 2,543 units would seem to put the City, without even trying, well along the way toward meeting its 4,845 unit 6th Cycle General Plan RHNA requirement, the Vice Chair asked how many, if any, of those will count toward it. [She was told](#) by staff that they *all* would.

This seems unlikely since some units listed under Uptown Newport are already occupied and counted in the 5th Cycle, some are likely “bonus units” that by state law are outside the General Plan and not counted toward RHNA, and only a fraction of the remaining units are likely to be in the affordable categories the City is most struggling to fill.

Item 16. Resolution No. 2021-98: Notice of Intent to Override the Orange County Airport Land Use Commission’s Determination of Inconsistency to the Draft Housing Element Update (PA2017-141)

The staff report ends, as these ALUC override reports always do, with the observation that “[Public Utilities Code Section 21678](#) states that if the City overrides ALUC’s action or recommendation, the operator of the airport shall be immune to 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.” It does not explain if as the airport operator *loses* liability the City *acquires* any. It has been said that it does not, but that would mean no governmental body assumes any liability for actions taken in contravention of public policy and against purportedly expert advice – which seems an improbable outcome.

It might also be noted that:

1. The sound contours specified for planning purposes in the [AELUP](#) are not actual measured contours, but rather theoretical contours based on projections of future airport activity prepared, it would seem, when major modifications are made to the [Commercial Airline Access Plan](#) or [Settlement Agreement](#). But last updated by the ALUC on April 17, 2008, which would seem to imply they do not reflect the [2014 Settlement Agreement amendments](#) or the new [General Aviation Improvement Program](#).
2. They do not purport to indicate *total* noise at any site, but rather only the contribution from *JWA aircraft-related noise events*. The total noise may well be higher if there are other sources (such as traffic).
3. Even if they represented actual measured airport-related noise contour positions, their locations may not be as precisely known as the diagrams might imply since California regulations ([21 CCR § 5080.3\(a\)](#)) require the airport noise monitoring devices to be accurate only to a rather loose “plus or minus 1.5 dB”

As to imprecision, it should also be noted that the Draft Housing Element reviewed and objected to by the ALUC has been claimed to be “only a draft” for which there will be ample opportunity for further comment and revision. It seems strange to take action to override the ALUC’s decision before the City knows what it might itself actually want to approve.

Finally, in the first paragraph of Facts in Support 1 on page 16-6, the second sentence should begin: "*Implementation of these standards **are is** intended to ...*"

Similarly, line 8 on page 16-7 should read: "... *with advanced insulation systems to bring the sound **after** attenuation to no more than 45 dB inside.*"

And on page 16-8, Section 2 was likely intended to begin: "*Based upon the foregoing **finds findings**, ...*"

Item 17. Resolution No. 2021-99: Ratifying the October 5, 2021 Proclamation of Local Emergency

At the end of the second "Whereas" on page 2 of the proposed resolution (staff report page 17-5), the phrase "**to combat**" (which does not appear in the City Manager's Proclamation on page 17-9) has been tacked on.

Its addition may have been well intentioned, but it makes little sense since the phrase seems grammatically to refer back to "the response." Does the Council really anticipate a need for combined forces to *combat "the response,"* as this seems to say?

I would suggest deleting "**to combat**", and leaving the passage as it was in the City Manager's Proclamation from which it was otherwise copied.

Item XIII. Matters Which Council Members Have Asked To Be Placed On A Future Agenda

As [Item 6](#) on the September 28, 2021, consent calendar, the Council created a Redistricting Committee. In [comments](#) on that, I noted petitions for an "Elect Our Mayor" initiative were circulating which, if enacted, would undo the work of the committee after a single election since it proposed to reduce the number of Newport's council districts from seven to six.

The Council is now being asked to consider asking staff to prepare a future agenda item for the purpose, according to the present agenda, of having the Council place the proposal contained in the "Elect Our Mayor" petitions directly on "*the June 7, 2022 Statewide Direct Primary Election or the November 8, 2022 General Municipal Election,*" eliminating the need for proponents to collect the petitions.

First, as previously indicated, the value of electing a mayor in a city with Newport's governmental structure is far less obvious than proponents claim.

Second, even if it were a good idea, the language the Council is being asked to consider adding to a future ballot is very unlikely to be that which would result from a more thoroughly and openly debated consideration of the matter.

Many signers of the petition may have the mistaken impression that Newport Beach has a "strong mayor" system of government in which the mayor serves as the agency's chief executive officer and bears a relationship to the council similar to that of the US President to Congress or the California Governor to the state Legislature. They are understandably shocked to learn they don't vote for their city's chief executive.

However, [Section 300](#) of our City Charter actually establishes a “Council-Manager” form of government, in which a neutral, non-political professional manager, hired by the Council, administers the policies set by the Council. The mayor, by contrast, is simply the presiding officer of that policy-setting council, much like the Speaker of the House and Senate President Pro Tem (or possibly Majority Leader) in Congress or the Assembly Speaker and Senate President Pro Tem in the Legislature. And in Newport Beach, the policy-setting council of which the mayor is a member, and over which he or she presides, is envisioned as a body of seven co-equal decision makers, geographically dispersed by a from-district residency requirement.

Signers might be equally shocked that they do not get to vote on the City Manager¹ or Speaker of the House. But electing supposedly neutral, trained professionals would arguably make them even more politically-motivated than they are now, and deliberative bodies are generally assumed to function best when they are free to choose their own leader.

As an example of the latter, the Newport Beach City Council appoints the Planning Commissioners and Harbor Commissioners, for example, but does not tell them who their chair should be.² One might reasonably question whether the voters who elect the Council, if they want it to operate efficiently and amicably, should tell it who its presiding officer should be.

At least some opponents seem to hold the equally mistaken impression that the proposal, if adopted, would create a strong mayor government in Newport Beach. The petition is actually extremely vague as to what powers an elected mayor would have compared to the clear enumeration of powers in most other cities that have one.

For reference, I have attached tables listing all Orange County cities and all other California cities larger than Irvine with links to the documents establishing and empowering an elected mayor, if they have one.

In the petition, the only clearly articulated new power proposed to be given to the Mayor is the statement that “*Except as provided in Section 405, the Mayor shall have sole discretion to set City Council agendas and to change the order of business on the agendas.*”³

Should the Council wish to have a future agenda item about the “Elect Our Mayor” proposal, I would suggest it would be wise for the item to not be an endorsement of the petition as written, but rather a study of whether an alternative to it should be placed on the ballot.

¹ Or, as in Huntington Beach, the city’s Clerk, Attorney and Treasurer.

² [Charter Section 704](#) actually (and probably wisely) prohibits the Council from doing so, although the Council does not always apply the same wisdom when appointing other citizens committees.

³ The proposed Section 405 allows any other three members of the Council to vote at any meeting to place an item on a future agenda. It is unclear if this provision giving the Mayor “sole discretion to set” City Council agendas conflicts with the basic manager-council structure of the City’s government by requiring the City Manager to seek the elected Mayor’s permission to put the City’s normal business before the Council for consideration.

Based on the survey presented in the following tables, the following observations might be made:

- Elected mayors are almost always associated with by-district elections. In some cases, by-districting voting was forced on the cities and there may have been a wish to retain at least one council member elected by a citywide constituency.
 - No California city larger than Irvine has both a mayor and a council elected at large
 - In Orange County, only Irvine and Westminster have an elected mayor presiding over a council each member of which is *also* elected at large, giving one at-large representative (the mayor) more power than the other at-large representatives.
- Five of the seven elected mayors in Orange County have 2-year terms, putting them on the ballot at each municipal election.
- There is no legal or practical requirement for city councils to have an odd number of voting members.
 - No matter the number, tie votes can and do happen due to absences and recusals
 - A tie vote is not a mathematical anomaly to be avoided, but rather simply a failed motion with one additional member's vote being required for passage of a measure.
 - Oakland, Bakersfield and Riverside are all examples of large cities functioning with eight voting member city councils.

In addition to the question of whether the creation of an elected mayor position should be tied to a transition to by-district voting for the other council members, the following points about the proposal presented in the petition would seem to need debate:

- Why is the number of districts being reduced from seven to six?
- If one district number absolutely needs to be eliminated, shouldn't it be District 1 instead of District 7?
 - Eliminating the District 7 designation leads to **two** of the 6 non-Mayor council members (from Districts 2 and 5) being on the ballot at one election and **four** at the next (Districts 1, 3, 4, and 6).
 - Eliminating the District 1 designation leads to **three** non-Mayor council members being on each successive ballot: Districts 2, 5 and 7 at one and Districts 3, 4 and 6 on the next. The non-existent "District 1" could be explained as an historical artifact created when voters decided to add an elected Mayor.
- Should an elected Mayor's term be four years? Or two years as in the vast majority of other Orange County cities with elected Mayors?
 - If the term *is* four years, shouldn't the position be filled in a non-Presidential election year when there is more focus on local ballot measures, rather than in a

Presidential election year where it will be a far down-ballot race checked off by distracted and low-information voters?

- Shouldn't the opportunity be taken to rewrite the Charter's ambiguous term-limit provisions for council members that have required clarification in NBMC [Chapter 1.32](#), and shouldn't the Mayor's term limits folded into that?
 - If the intent is to prevent more than two consecutive elected terms, possibly preceded by half a term attained by appointment, many cities approach this with greater clarity and concision using a statement such as "The Clerk shall not accept nomination papers from a person whose term, if elected, when added to their previous service on the council would lead to more than 10 continuous years."
 - It is also unclear why the term limit on the Mayor's office should be a lifetime one, whereas that for Council members is on consecutive terms, regaining eligibility after an unspecified time out of office (which is in need of being specified); and why the limits for Mayor and Council member would not be combined.
- Why should a vacancy in the position of Mayor require a costly special election when vacancies in the other Council positions do not? Shouldn't they be treated the same?
 - A politically ambitious elected Mayor seems even more likely than a Council member to create a vacancy by winning election to some other office during their term or while running simultaneously for re-election.
- Why should a sitting or termed-out Council member be able to run for Mayor, but a Mayor not run for Council?
- Does there need to be a provision preventing a person from running simultaneously for Mayor and Council?
 - If not, does there need to be a rule, as in Irvine, that the vacated Council seat of a person who wins both will be automatically filled by the runner-up in the Council race, without need for appointment or a special election.⁴
- Don't the powers and duties of the elected Mayor need to be spelled out in more detail, including especially how they coordinate with the City Manager?
- Does the City Manager's role in setting the Council agenda need to be spelled out in Charter [Section 504](#)?⁵

⁴ A sitting Council member who runs and wins the Mayor position in a year their Council seat is not up for election would also create a vacancy. But presumably that would be treated the same as if they had run for any other office and won.

⁵ Among the powers and duties of the City Manager that are currently enumerated in that section, I see one is to "Prepare and submit to the City Council as of the end of the fiscal year a complete report on the finances and administrative activities of the City for the preceding fiscal year." I suppose the [CAFR](#) might pass as the financial report, but I do not recall one recapping the year's administrative activities.

- Is the elected Mayor position expected to be a full-time one? If so, does that need to be spelled out and the pay made higher?

Beyond these, and many other points needing a clearer consensus, much of the language presented in the petition seems carelessly written.

- **Section 400:** The statement that *“The term “City Council,” “legislative body,” or other similar terms as used in this Charter or any other provision of law shall be deemed to refer to the collective body composed of the Mayor and City Council members unless such other provision of this Charter or other provision of law expressly provides to the contrary or unless such interpretation would be clearly contrary to the intent and context of such other provision”* creates a whole new set of uncertainties.
 - Who decides what interpretation is correct in a given Charter passage?
 - Shouldn't at least the Charter be written so the use of those terms within it is clear and unambiguous at every point?
- **Section 401:** What is the intent of crossing out a provision about consecutive terms added in 1992 and replacing it with the statement that *“This section is not intended to change the limit on consecutive terms for a member of the City Council enacted by voters in November 1992”*? No one reading the Charter will now know what the deleted passage said or why it was deleted. I am baffled.
- **Section 405:** Why is a trivial procedure passage (*“With the concurrence of at least three members of the City Council at any public meeting, an item may be added to a future City Council agenda”*) placed in the overarching section vesting most of the City's powers in the Council? Shouldn't it go in a section dealing with procedural matters, such as Section 410?
- **Section 1005:** Since some minor changes are being proposed to the language of this section, shouldn't the opportunity also be taken to correct *“from the district from which he or her was nominated or appointed”*?

Again, if the Council wishes to direct staff to create an agenda item for consideration of the “Elect Our Mayor” petition, I would suggest that instead of being a proposal to place the petition language directly on the ballot it be rather the framing of a discussion of modifications or alternatives that might be placed on the ballot.

All non-Orange County California cities larger than Irvine

Name	Population	Charter?	Council Size (incl. Mayor)	By District Elections?	Mayor		Notes
					Elected?	Term (yrs)	
Los Angeles	3,898,747	x	16	x	<u>x</u>	4	Mayor is chief executive, similar to city manager but with veto power over council
San Diego	1,386,932	x	10	x	<u>x</u>	4	Mayor is chief executive, similar to city manager but with veto power over council
San Jose	1,013,240	x	11	x	<u>x</u>	4	Council-manager, mayor is political leader, has no veto
San Francisco	873,965	x	12	x	<u>x</u>	4	Mayor is county executive officer with veto power over council
Fresno	542,107	x	8	x	<u>x</u>	4	Mayor is CEO overseeing separate City Administrative Officer, has veto and presents budget
Sacramento	524,943	x	9	x	<u>x</u>	4	Council-manager, mayor is political leader, has no veto
Long Beach	466,742	x	10	x	<u>x</u>	4	Full-time Mayor does not vote but can veto council actions forcing 2/3rds override, must be replaced by election; separate lifetime 3-term limits
Oakland	440,646	x	9	x	<u>x</u>	4	Fulltime mayor paid 80% of city manager, veto with 5-vote override, recommends budget with manager, 8 council members (1 at large)
Bakersfield	403,455	x	8	x	<u>x</u>	4	Council-manager, mayor gets office and staff person, votes only to break ties
Stockton	320,804	x	7	x	<u>x</u>	4	Council-manager, fulltime mayor is political leader, has no veto; city holds primary and run-offs for all seats
Riverside	314,998	x	8	x	<u>x</u>	4	Council-manager, mayor votes only to break ties

Orange County cities - Part 1

					Mayor		
Name	Population	Charter?	Council Size (incl. Mayor)	By District Elections?	Elected?	Term (yrs)	Notes
Anaheim	346,824	x	7	x	<u>x</u>	4	8 consecutive years combined limit (Council + Mayor); not allowed to run for both
Santa Ana	310,227	x	7	x	<u>x</u>	2	8 year cooling off after 8 years as Mayor or 20 total
Irvine	307,670	x	5		<u>x</u>	2	2-term limit for Mayor, if Council member runs and wins the vacancy is filled by first runner-up
Huntington Beach	198,711	x	7				also elect: City Clerk, City Treasurer and City Attorney
Garden Grove	171,949		7	x	<u>x</u>	2	4 consecutive term limit for Mayor, separate from Council
Fullerton	143,617		5	x			
Orange	139,911		7	x	<u>x</u>	2	
Costa Mesa	111,918		7	x	<u>x</u>	2	2-term limit for Mayor, separate from terms on council
Mission Viejo	93,653		5				At-large Council in process of changing to by district voting
Westminster	90,911		5		<u>x</u>	4	
Lake Forest	85,858		5	x			
Newport Beach	85,239	x	7				
Buena Park	84,034	x	5	x			
Tustin	80,276		5				
Yorba Linda	68,336		5				
Laguna Niguel	64,355		5				
San Clemente	64,293		5				
La Habra	63,097		5				
Fountain Valley	57,047		5				
Aliso Viejo	52,176		5				

Orange County cities - Part 2

					Mayor		Notes
Name	Population	Charter?	Council Size (incl.Mayor)	By District Elections?	Elected?	Term (yrs)	
Placentia	51,824	x	5	x			
Cypress	50,151	x	5				
Rancho Santa Margarita	47,949		5				
Brea	47,325		5				
Stanton	37,962		5	x	x	4	lifetime 2-term limit for service on council appears to include as mayor
San Juan Capistrano	35,196		5	x			
Dana Point	33,107		5	x			
Laguna Hills	31,374		5				
Seal Beach	25,242	x	5	x			
Laguna Beach	23,032		5				
Laguna Woods	17,644		5				
La Palma	15,581		5				
Los Alamitos	11,780		5				
Villa Park	5,843		5				