



TO: Mayor and Council

FROM: City Attorney

SUBJECT: Memorandum in Response to Media Report re: March 7, 2023 City Council Introduction of Ordinance and Accompanying Resolutions Updating Alcoholic Beverage Regulations

DATE: March 28, 2023

INTRODUCTION

The purpose of this memorandum is to review the process by which the City Council on March 7, 2023, considered and acted on a staff recommendation to introduce an ordinance and accompanying resolutions updating the City's alcoholic beverage regulations. The staff recommendations were approved unanimously. Subsequent to the March 7 meeting, a media report characterized the Council's actions as, a) violative of the Brown Act, b) unduly influenced by special interests, and c) inconsistent with the Council's procedural rules. These allegations are uninformed and unsupportable. We have reviewed the meeting carefully and in its entirety. To clarify the record and as explained hereinafter, the Council's actions on March 7 were transparent, consistent with the Brown Act and the concepts of due process, and followed the procedural framework set out in the Council handbook.

BACKGROUND

On March 7, 2023, the Council conducted a noticed public hearing to consider a staff report with recommendations to introduce an ordinance and accompanying resolutions updating the City's alcoholic beverage regulations. The staff report can be found here ([CITY OF HAYWARD - File #: PH 23-013 \(legistar.com\)](#)). The staff report essentially recommended changing the 'happy hour' from 4 to 9 p.m., to 3 to 8 p.m., and reducing the ratio of food to alcohol gross receipts from 60/40 percent to 50/50 percent, the latter to align with regulations of the state's Alcoholic Beverages Control department. The staff report indicated the recommendations had been reviewed by the Council's Economic Development Committee and Planning Commission after extensive public outreach.

ANALYSIS

The public hearing was called to order at approximately 7:20 p.m. At 7:28 p.m., the Mayor and Council email account received an email from Jorge Espinosa who identified himself as the owner of a restaurant and member of the chamber of commerce (Attachment A). At

7:32 p.m., Espinosa sent the same email to the Mayor and Council account but from a different email address (Attachment B). The Mayor and Council email account includes all members of the Council and several staff members. All members of the Council have confirmed to the City Attorney that they received the emails at 7:28 p.m., or 7:32 p.m., which the City Clerk published to the City's website as documents received after publication of the agenda. Espinosa asked the Council to delay action and consider further study of possible changes to the regulations. City staff members have also confirmed receipt of the Espinosa emails at 7:28 p.m., or 7:32 p.m.

There were no further written or electronic communications from Espinosa or anyone else after 7:32 p.m. In the Council Chamber, two members of the public testified on the matter and engaged with the Council during public discussion. No members of the public called in via the Zoom platform to testify during the hearing. In short, the hearing was properly noticed and anyone interested in the matter had the opportunity to participate. There were no 'e-comments' submitted after the agenda was published. The hearing met all the requirements of 'due process,' which means it was fundamentally fair based on federal and state constitutional principles.

The public hearing was closed at approximately 8:10 p.m. After discussion among the members, Council Member Zermeno moved to support the staff recommendation. Council Member Syrop seconded Zermeno's motion but offered a 'friendly amendment' to eliminate altogether the 60/40 ratio. Council Member Zermeno initially accepted the proposed amendment.

Of significance, the staff recommendation included reduction of the ratio to 50/50 percent to align with current economic development models, but it did not include elimination of the ratio altogether. In fact, during the Council's discussion there was concern that elimination of the ratio would result in establishments that predominantly sold alcohol with limited or no food options. Staff pointed out that ABC regulations would still require a 50/50 ratio, thus precluding elimination of the ratio altogether. Staff also pointed out that conditional use permits might also restrict alcohol sales.

During the discussion, Council Member Roche suggesting separating the 'friendly amendment' and voting on it as a stand-alone motion, distinct from Council Member Zermeno's main motion.

in summary, what is clear is that the 'friendly amendment' was in fact a procedurally improper 'substitute motion.' A substitute motion, under Robert's Rule, is separate and distinct from a pending main motion and raises substantive new issues, although it does take precedence over the main motion. The Council's Handbook, however, prohibits substitute motions (see page 42 of the Handbook, Attachment C). Elimination of the ratio altogether was inconsistent with the main motion, and it was not a 'friendly amendment.'

Council Member Zermeno recognized the procedural irregularity and rejected the 'friendly amendment,' leaving only the main motion on the floor. Mayor Salinas sought a new second

to the main motion. Council Member Goldstein offered to second the main motion.

During the Council's lengthy discussion, Council Member Marquez referred to a message on her phone as related to the hearing. In fact, Council Member Marquez was referring to the Espinosa message(s) that all members had previously received. Council Member Marquez noted the Espinosa message asked for the matter to be continued for further consideration, which she indicated she would not support.

All members of the Council have confirmed that their only discussions about the subject of the hearing occurred during the meeting itself and on the record. There were no secret or private communications among them during the meeting, nor were there any secret or private communications with members of the public. Consequently, there were no Brown Act violations as alleged in the media report.

With only Council Member Zermeno's main motion on the floor, seconded by Council Member Goldstein, Mayor Salinas called the question, which was approved unanimously. The hearing concluded at approximately 8:50 p.m.

CONCLUSION

A careful review of the March 7 hearing leads to a conclusion that it was fully transparent, in no way violative of the Brown Act, and procedurally the Council got it right -- that is, the 'friendly amendment' was in fact a substitute motion not allowed by the Council Handbook. The Council was not influenced by 'special interests' with some sort of 'insider' access. To the contrary, the request to continue the item was rejected by the Council. The media account also attempted to link the Council's March 7 meeting to alleged Brown Act improprieties related to the Alameda County Board of Supervisors. There is no link or connection between the Council's actions and whatever Brown Act issues the board may have dealt with.

Respectfully submitted,



City Attorney

Attachments A (Espinosa email at 7:28 p.m.)
B (Espinosa email at 7:32 p.m.)
C (Council Handbook, page 42)

Michael Lawson

From: Miriam Lens
Sent: Tuesday, March 7, 2023 8:24 PM
To: Avinta Madhukansh
Subject: FW: Alcoholic Beverages Regulations Ordinance

Avinta

Please add to documents received for 3/7 packet.

Thanks

Miriam Lens, City Clerk

From: Jorge Espinosa <jorge.e.rihani@comcast.net>
Sent: Tuesday, March 7, 2023 7:28 PM
To: List-Mayor-Council <List-Mayor-Council@hayward-ca.gov>
Subject: Alcoholic Beverages Regulations Ordinance

CAUTION:This is an external email. Do not click on links or open attachments unless you know the content is safe.

I'm an owner and operator of one of the local restaurants and hold a current ABC 47 Liquor License.

During the time staff did their research, we were under Covid-19 State of Emergency. Most of the news from the Cities and Counties were to support the then emergency ordinances.

I strongly suggest with no fault to Staff that the information gathered for this reports is NOT applicable currently and will be a decision made based on the wrong background.

My self and others local restauranteurs had a conversation about it today and we are concern about the City Council adopting the ordinance based on this report.

I also feel that the report is incomplete. They are multiple concerns and untight ends that will become a problem in the future.

I would like to propose the move of this item for a later date and give us the opportunity to speak with you and/or staff to raise our concerns.

Respectfully

Jorge Espinosa

Michael Lawson

From: Miriam Lens
Sent: Tuesday, March 7, 2023 8:27 PM
To: Avinta Madhukansh
Subject: FW: Alcoholic Beverage Regulations Ordinance

Avinta

Please add to documents received after agenda published for 3/7 agenda packet.

Thanks

Miriam

From: jorge eltaquitorrestaurant.com <jorge@eltaquitorrestaurant.com>
Sent: Tuesday, March 7, 2023 7:32 PM
To: List-Mayor-Council <List-Mayor-Council@hayward-ca.gov>
Subject: Alcoholic Beverage Regulations Ordinance

CAUTION:This is an external email. Do not click on links or open attachments unless you know the content is safe.

I'm an owner and operator of one of the local restaurants and hold a current ABC 47 Liquor License.

During the time staff did their research, we were under Covid-19 State of Emergency. Most of the news from the Cities and Counties were to support the then emergency ordinances.

I strongly suggest with no fault to Staff that the information gathered for this reports is NOT applicable currently and will be a decision made based on the wrong background.

My self and others local restauranteurs had a conversation about it today and we are concern about the City Council adopting the ordinance based on this report.

I also feel that the report is incomplete. They are multiple concerns and untight ends that will become a problem in the future.

I would like to propose the move of this item for a later date and give us the opportunity to speak with you and/or staff to raise our concerns.

Respectfully

Jorge Espinosa

MOTIONS

PROCESSING OF MOTIONS

When a motion is made and seconded, it shall be stated by the Mayor before debate. A motion so stated shall not be withdrawn by the mover without the consent of the person seconding it. A Council member will request to speak, be recognized by the Presiding Officer, and verbally move the item and wait for a seconder.

BUSINESS ITEMS OUT OF ORDER

The Mayor may at any time, by majority consent of the Council, permit a member to introduce an ordinance, resolution, or motion out of the regular agenda order.

DIVISION OF QUESTION

If the question contains two or more divisible propositions, the Mayor may, upon request of a member, (unless appealed) divide same.

MOTION TO FIX HOUR OF ADJOURNMENT

Any regular meeting can be adjourned to a stated date, time, and place.

MOTION TO TABLE

A motion to table shall be used to temporarily bypass the subject. A motion to table is not debatable and shall preclude all amendments or debate of the subject under consideration.

MOTION TO LIMIT OR TERMINATE DISCUSSION

Such a motion shall be used to limit or close debate on, or further amendment to, the main motion and shall be undebatable. If the motion fails, debate shall be reopened; if the motion passes, a vote shall be taken on the main motion.

MOTION TO AMEND

A friendly amendment shall be in order if it is consented to by both the maker of the motion and the second. A motion to amend shall be debatable only as to amendment. A motion to amend an amendment shall be in order, but a motion to amend an amendment to an amendment shall not be in order. Similarly, a substitute motion shall not be in order. An amendment modifying the intention of a motion shall be in order, but an amendment relating to a different matter shall be treated as a substitute motion and shall not be in order. Amendments shall be voted upon first. The main motion shall then be voted on either as amended or as originally stated if the amendment failed to pass.