



VIA FAX ON 2.15.2020  
Courtesy copy by email

15 February 2020

Gee Wah Mok, Board Clerk  
Del Mar Union School District  
11232 El Camino Real  
San Diego, CA 92130  
858.523.6114 fax  
gmok@dmusd.org

Dear Mr. Mok:

I write to you in your capacity as Board Clerk to address the December 10, 2019 closed session meeting of the DMUSD Board of Trustees. ("Board").

For reasons described below, the meeting was illegally closed to the public in violation of the Ralph M. Brown Act, Government Code section 54950 et seq. As required by § 54960 (as a pre-condition of further action) this letter describes the nature of the violations and allows the Board the opportunity to provide an unconditional commitment under § 54960.2 to cease and desist from further illegal closed meetings. I am writing to you as Clerk, as required by § 54960.2.

The Board's agenda (excerpted below) describes the December 10 closed meeting as falling within § 54956.9 (d)(2), one of the few provisions that triggers an exception to the Brown Act's open meeting mandate:

### **3. CLOSED SESSION**

3.1 CONFERENCE WITH LEGAL COUNSEL--ANTICIPATED LITIGATION  
Significant exposure to litigation pursuant to paragraph (2) of subdivision (d) of Section 54956.9: (1 case) regarding Del Mar Heights School Rebuild Project

Section 54956.9 (d)(2) only applies if the Board reached a conclusion, after having been advised by counsel, based on ***existing facts and circumstances***, that there is a significant exposure to litigation. Section 54956.9 (e) limits the ***existing facts and circumstances*** under (d)(2) to five particular categories that are specifically spelled out under (e)(1) through (e)(5).

In a January 17, 2019 letter to me from district lawyers (Exhibit 1) responding to a California Public Records Act Request, the district purports to base its decision to



close the meeting on either 54956.9 (e)(4) or (e)(5). Neither justifies the Board's decision to exclude the public.

#### Section (e)(4)

Section (e)(4) requires a statement made in an open and public meeting from someone ***threatening litigation***. The letter from counsel addressed (e)(4) in paragraph 6 and attached a document purportedly showing that someone at the Independent Citizens Oversight Committee Meeting on December 3, 2019 made a ***statement threatening litigation***.

But the document produced by counsel says nothing about a statement threatening litigation, made at that public meeting. It identifies four members of the public (including myself) as having made comments but says nothing about a statement threatening litigation having originated from anyone, even though it makes notes about the public comments in some detail.

I attended the full meeting on December 3. Nobody made a statement threatening litigation, much less a statement threatening litigation based on existing events or circumstances. I spoke first and expressed a hope to talk to the Board to encourage them to avoid taxpayer waste by not choosing a design that would create an unauthorized public park and related parking spaces and by paying for new baseball fields. Quin-Hong Anderson related how her hometown in China was transformed from outdoor play areas into concrete. Irene Young passionately discussed the value of outdoor play spaces for children. Kelley Huggett described the rebuild process as broken, said voters approved the bond to rebuild the school rather than cover the fields with buildings, and requested the committee to look closely at how funds were being used against the community.

None of these discussions were ***statements threatening litigation***. In addition, they all discussed contingent possibilities knowing that the Del Mar Heights site remains in flux and a final design has not even been decided by the Board. Section (e)(4) cannot justify the Board's decision to exclude the public from the December 10 board meeting.

#### Section (e)(5)

Counsel's letter (see paragraph 7) also bases the decision to close the meeting on (e)(5), which requires a ***statement threatening litigation*** made by someone outside an open and public meeting. Under (e)(5), a record must be made of such a statement in order to justify a closed meeting. Counsel's letter claims the statement threatening litigation was indeed recorded, as follows:



There is one contemporaneous and/or other record, consisting of a legal memorandum from the District's legal counsel, but such record is not disclosable per the attorney client privilege and attorney work-product doctrine (Gov. Code § 54956.9, subd. (f).)

If such a document does in fact exist, by its terms section (e)(5) nevertheless would not apply. It only applies ***"so long as"*** such a document ***"shall be available for public inspection pursuant to Section 54957.5."*** The document referred to in counsel's letter was not made available for ***public*** inspection under Section 54957.5. In fact, access has been refused under the California Public Records Act even today. Section (e)(5) cannot justify the Board's decision to exclude the public from the December 10 board meeting.

Based on the above, the board committed the following violations of the Brown Act:

- holding a closed session under (e)(4) without proof of any statement threatening litigation made in an open and public meeting;
- holding a closed session under (e)(5) absent a record, made available for public inspection before the closed session, of a statement threatening litigation made outside an open and public meeting;
- holding a closed session to discuss theoretical legal exposure by the district on the Del Mar Heights Elementary Rebuild, based upon a possible future site design.

Public interest in the school rebuild remains intense. Public comments and criticisms continue to be made about the fluctuating site design – comments just like those alleged to have justified the illegal December 10 closed session. As a result, there is every reason to believe that the Board will schedule additional illegal closed meetings.



Please let me know whether the Board will agree not to violate the Brown Act similarly in the future and whether the Board will agree to make an unconditional commitment to avoid the specific three violations above, under the terms of Section 54960.2.

Sincerely,

A handwritten signature in black ink, which appears to read "John E. Gartman". The signature is fluid and cursive, with the first and last names being more prominent.

John E. Gartman, President  
Play Outside Del Mar  
[john@playoutsidedelmar.org](mailto:john@playoutsidedelmar.org)  
619. 517.1010

# EXHIBIT 1

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A PROFESSIONAL LAW CORPORATION

ATTORNEYS AT LAW

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OUR FILE NUMBER:

Jeff.Frey@aallrr.com

January 17, 2020

**VIA EMAIL**

Mr. John Gartman  
john@thegartmans.com

**Re: Response to your Public Records Act requests dated January 8, 2020**

Dear Mr. Gartman:

By way of introduction, our Firm represents the Del Mar Union School District ("District") regarding the above-referenced matter. We are in receipt of your email to Dr. Holly McClurg dated January 8, 2020, wherein you request electronic copies of certain documents per the Public Records Act (Gov. Code § 6250 *et seq.*). Please accept this correspondence as the District's response per Government Code section 6253, subdivision (c).

Below, we respond to your document requests in bold text:

1. The public portions of the audio recording of the December 10, 2019 Governing Board of Trustees Special Meeting.

**No such records exist.**

2. Any written reports of any action taken in closed session.

**For purposes of this response, including our responses below, we assume you are referring to the Governing Board of Trustees' ("Board") Special Meeting on December 10, 2019, which is referenced above in your first document request.**

**No such records exist. Additionally, any such records would not be disclosable per Government Code sections 54957.2 and 54963, the attorney-client privilege, and the attorney work-product doctrine.**

3. All documents, notes, or other written materials evidencing discussion of any items during the meeting that were unrelated to "anticipated litigation".

**No such records exist.**

Mr. John Gartman  
January 17, 2020  
Page 2

4. A copy of all non-privileged documents distributed or shown to board members at the meeting (including all non-privileged pages of multi-page documents if portions of such multi-page documents are privileged).

**No such records exist.**

5. If the “anticipated litigation” discussed at the Meeting was based on a written communication from a potential plaintiff threatening litigation under Government Code 54956(e)(3), a copy of the communication and any response by the district or further exchanges with the potential plaintiff.

**No such records exist.**

6. If the “anticipated litigation” discussed at the Meeting was based on a statement by a person in an open and public meeting under Government Code 54956.9(e)(4), a copy of all documents that constitute, memorialize, evidence, or transcribe the statement and any response by the district or further exchanges with the person.

**The District possesses a responsive and disclosable public record, which is included with this letter.**

7. If the “anticipated litigation” discussed at the Meeting was based on a statement threatening litigation made by a person outside an open and public meeting under Government Code 54956.9(e)(5), a copy of the contemporaneous or other record of the statement made prior to the Meeting (pursuant to 54957.5), and any response by the district or further exchanges with the person.

**There is one contemporaneous and/or other record, consisting of a legal memorandum from the District’s legal counsel, but such record is not disclosable per the attorney-client privilege and attorney work-product doctrine. (Gov. Code § 54956.9, subd. (f).)**

8. If the “anticipated litigation” was brought to the district’s attention by a communication from a person other than the potential plaintiff, a copy of all documents that refer, relate to, comprise, or evidence the communication and any response by the district or further exchanges with the person.

**No such records exist.**



Mr. John Gartman  
January 17, 2020  
Page 3

9. All documents identified, discussed, referred to, or relied upon in any threat of litigation, or in response to any threat of litigation.

**There is one responsive document, consisting of a legal memorandum from the District's legal counsel, but such record is not disclosable per the attorney-client privilege and attorney work-product doctrine. (Gov. Code § 54956.9, subd. (f).)**

10. All contracts or other agreements, such as liability insurance, that might cover DMUSD officers and/or board members in the event of personal liability for actions as a board member in connection with the Del Mar Heights School Rebuild Project, including agreements to defend, indemnify, or reimburse a board member for liability for their actions.

**The District has already provided you with all responsive documents in the District's response sent to you on January 10, 2020, consisting of various contracts.**

11. All contracts or other agreements, such as liability insurance, that might cover DMUSD for liability in connection with the Del Mar Heights School Rebuild Project, including agreements to defend, indemnify, or reimburse DMUSD for liability.

**The District has already provided you with all responsive documents in the District's response sent to you on January 10, 2020, consisting of various contracts.**

12. All documents relating to any funds set aside or reserves for covering liability for actions in connection with the Del Mar Heights School Rebuild Project.

**No such records exist.**

13. All communications with any third party about the "anticipated litigation".

**No such records exist.**

*(Remainder of page left blank)*



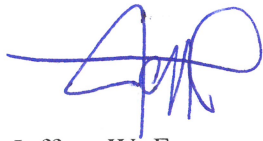
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Mr. John Gartman  
January 17, 2020  
Page 4

Per Government Code section 6253, all disclosable documents are being enclosed with this response. Feel free to contact the undersigned with any questions.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A handwritten signature in blue ink, appearing to be 'JW Frey', with a large loop at the end.

Jeffrey W. Frey

JWF:

cc: Dr. Holly McClurg, Superintendent  
Chris Delehanty, Executive Director, Capital Programs & Technology

**ORGANIZATIONAL MEETING OF THE  
CITIZENS' OVERSIGHT COMMITTEE OF THE  
DEL MAR UNION SCHOOL DISTRICT  
(MEASURE MM - APPROVED BY DISTRICT VOTERS ON NOVEMBER 6, 2018)**

**AGENDA**

**December 3, 2019**

**5:30 p.m.**

Del Mar Union School District Office Training Center  
11232 El Camino Real, San Diego, CA 92130

Citizens' Oversight Committee Website: <https://www.dmusd.org/Page/8772>

**A. CALL TO ORDER: 5:30 p.m.**

Acting Chairperson: Robert E. Anslow

**B. ROLL CALL (Establishment of a Quorum)**

Committee Members:

Kathy Huang	Business Community Representative
David Jackson	Taxpayer Organization Representative
Ira Sharp	Senior Citizens' Organization Representative
Katie Hazen	Parent-Teacher Organization Representative
Sameer Vora	Parent of Enrolled DMUSD Student Representative
Fuxiao Xin	Community-At-Large Representative
Neelum Arya	Community-At-Large Representative

**All present**

**C. PLEDGE OF ALLEGIANCE**

**D. PUBLIC COMMENTS**

1. At this time, the Committee welcomes public comments. A total of 30 minutes is provided so members of the public can address the Committee. Speakers are limited to three (3) minutes. Unless the item has been placed on the published agenda in accordance with the Brown Act, there shall be no action taken in response to public comments submitted. The Committee may: (1) acknowledge receipt of the information; (2) refer the matter to staff with no direction as to

action or priority; and/or (3) direct that the matter be agendaized for a future meeting of the Committee.

Parent comment

1. John Gartman, Electrical Engineer, law degree
  - a. Save the fields and issues: waste of money
  - b. Issues he would like to bring to our attention
  - c. Would like to have 30 minutes at next board meeting to discuss
  - d. School is planning to make a public park-no authorization to do this
  - e. Should only be for school business
  - f. 30 extra parking places just for park use
  - g. Little league for baseball fields
2. Qin-Hong Anderson, Second parent brought tax bill...voted for MM
  - a. Is in favor of fields not being taken away
3. Irene Young, Third community member in favor of keeping large fields
  - a. Exercise a big part of learning
4. Kelley Huggett, Fourth person – look closely to money and how it is used. For the fields staying large
  - a. Feels as though no one has listened to the concerns about this
  - b. Appreciates everyone's time

E. APPROVAL OF MINUTES

1. October 2, 2019 Minutes  
Ira Sharp  
Katie Hazen second

F. DISCUSSION AND POSSIBLE ACTION(S) ON PROPOSED CITIZENS' OVERSIGHT COMMITTEE BYLAWS

Ira-agreed with the bylaws – motion to approve David Jackson second no opposed 7-0  
Neelum – how does something get on the agenda? Process any member of committee can ask to add something to agenda – this is a rule by law can only request...has to be approved

G. REVIEW AND DISCUSS FINAL OFFICIAL STATEMENT FROM MEASURE MM 2019 SERIES A BOND SALE

1. Final Official Statement link

Rob Anslow – description of how the bond issuance and process works – any questions?

It is online

H. PRESENTATION OF FIRST SET OF MEASURE MM, SERIES 2019 A BOND PAYMENT LOG

Mark presenting

1. Reviewing expenditure log-how format looks
2. Preliminary budget Heights
3. Break down expenditures by site
4. Details on contracts awarded
5. Budget through Oct 31, 2019

6. Shows payment dates  
Neelum concerned that the survey is not accurate. Partially completed. Will the survey be made public? Typically it goes to the architect. Can be obtained as a public record (Anslow said). Another surveyor would have to see if it is accurate or not
7. PCH – Mark spoke about how this format looks also (same as 1-6 above)
8. Kathy spoke about toxic expenses. Different because we had to resubmit
9. How will it be clear what money is MM money and what is CFD? We have to spend certain money from MM fund first and after that CFD. Anslow said federal law have to spend money within 36 months (restricted funds).
10. How many classrooms 21 +2 Heights
11. PCH 20 classrooms – plus kitchen why more expensive  
Environmental costs – David Jackson.

**I. PROJECT PROGRESS UPDATE-chris**

Rebuild and school #9

Heights – continuing to take input from community

Spoke about the process of CEQA

Question on land purchase – change dates to land purchase to December 2019

Change of CEQA – December 2019

**J. PRESENTATION OF CITIZENS' OVERSIGHT COMMITTEE WEBSITE INFORMATION  
Chris**

Spoke about our website online. Measure MM page

Will be adding bylaws to website

Contact info on website – are any committee members comfortable to having personal contact info on website (Anslow spoke about this)

We can look into setting up an email account that we can forward emails from to committee members (Chris). Website should be an agenda item at next meeting – look at options

Anslow- does committee like the format of website?

Add item of when next meeting will be – date time and place

Do we have hard stop times? Up to the committee to decide that as a rule

Can add that to the website (target duration of meetings)

Brown acts says that public comments before in beginning...they can say though that they want to speak about a certain agenda item later and that is ok

**K. DISCUSSION AND POSSIBLE ACTION(S) ON CITIZENS' OVERSIGHT COMMITTEE  
ELECTION OF OFFICERS**

Anslow – President, VP, secretary

Anyone interested?

Neelum VP – she firsts and David Jackson seconds

7-0 vote

Secretary – Ira nominated as secretary – Michelle can take minutes and he will countersign

Motion and second 7-0 votes

Rob Anslow will remain acting chairperson for now.

Cathy – suggested if someone wants to be president, he can come and be moderator and help teach how to do it. All these positions will last 2 years and then they can be re-appointed – up for re-newal

L. DISCUSSION AND POSSIBLE ACTION RELATIVE TO PROPOSED COMMITTEE MEETING SCHEDULE FOR 2020

Next meeting – Monday February 3, 2020

Training room 5:30-7:00

1. Set date, time and place for the next meeting(s) of Citizens' Oversight Committee

Next meeting discuss meeting dates for rest of the year

M. COMMENTS FROM COMMITTEE MEMBERS

Anslow discussed what should remain on agenda next time

Kathy wants to find a good way about what community is thinking – know issues of contention

Neelum – suggested Del Mar Times

Chris/Anslow – stated that design does not become a part of COC (jurisdiction)

David Jackson asked about heights parking spots not for school use. Enough parking for staff and visitors. Tab 8 (Anslow) res 2018-20 attachment 1 page 1-1 after resolution. Page 1-3 heights school states what can spend money on...third bullet...answered question. Anslow taught committee member how to use their binder to see how our funds are spent

Civic Center act (Anslow) we can manage group that want to use District property

Bond Counsel – carefully defines what we are doing

David asked if architects know about public concerns. Yes, they are at board meetings

Katie asked if green space still the same...still there

David – how much green space will be lost –

Neelum addressed last board meeting and what was discussed-building up, keeping same footprint

Committee meeting can go to board meetings and can state their opinion (Anslow)

Brown act will state (1<sup>st</sup> of the year) can not discuss committee items with committee outside of meeting, but can with public not on committee

In Brown Act in binders

N. ADJOURNMENT 7:03 pm

Compliance with the Requirements of California Government Code Section 54954.2 In compliance with California law and the Americans with Disabilities Act, if you need special disability-related modifications or accommodations, including auxiliary aids or services in order to participate in this meeting, or if you need this agenda provided in an alternative format, please contact the District Office Administration at telephone (858) 755-9301 (as representative of the Committee) at least 72 hours in advance of the scheduled Committee meeting. Notification 72 hours prior to the meeting will assist the Committee and the District in making reasonable arrangements to accommodate your request. The meeting room(s) is/are wheelchair accessible.

Availability of Agenda Materials: Agenda exhibits and other writings that are disclosable public records distributed to all or a majority of the members of the Del Mar Union School District Citizens' Overnight Committee in connection with a matter subject to discussion or consideration at an open meeting of the Citizen's Overnight Committee(s) are available for public inspection at the District's Business Offices located at 11232 El Camino Real, San Diego, California. If such writings are distributed to members of the Committee less than 72 hours prior to the meeting, they will be available in reception area of the District's Business Offices at the same time as they are distributed, except that, if such writings are distributed immediately prior to, or during, the meeting, they will be available in the School District's Business Offices.