



Berkeley City Councilmembers

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Alameda-Contra Costa Transit District Board of Directors

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RE: "Recommendations for the AC Transit Board of Directors to Increase Board Effectiveness and Cohesion"

Dear Members of the AC Transit Board of Directors,

We, the undersigned members of the Berkeley City Council, are deeply disappointed and alarmed by the Board of Directors' potential acceptance and implementation of The Wathen Group's (TWG) report and recommendations on "Board Effectiveness." We write as individual members of the Berkeley City Council and not on behalf of the Berkeley City Council as a body.

We urge members of the Board of Directors to reject the report as written, and to instead request that the consultant engage in significant, substantive revisions to: address the specific issues identified in this letter; rectify numerous typos and drafting errors; and (most importantly) overhaul the "spirit" of the report to better reflect our shared democratic values and the East Bay's history of community activism and engagement.

Carrying out the recommendations in this report would abridge the free speech rights of board members and members of the public, reduce transparency, discourage public participation, and likely result in multiple violations of the California Brown Act. We cannot imagine that the AC Transit Board embarked on this process with the intent to follow in the footsteps of the current federal administration in its efforts to undermine accountability, curtail freedom of expression, and short-circuit the mechanisms of democratic participation. Thankfully, there remains the opportunity for the report consultant and Board to course-correct.

It is ironic and telling that within the first few pages, this report contradicts itself and issues a broad recommendation that would subvert the very purpose of a public agency board, with the bottom of report page 5 reading:

The board must focus on the "How" (execution, tactics, and individual personnel) and not the "What" (policy, strategy, and organizational outcomes).

This has it precisely backwards and contradicts text earlier on the very same page that reads "The board is accountable for setting direction." We suspect this was a drafting mistake; however, we are deeply concerned by the ways in which this mistake appears to inadvertently reflect the report's overall tendency toward limiting the ability of board members and the public to actively engage in setting policy, providing oversight, and improving agency outcomes.

Page 7 of the report explicitly states, "Board members must not actively organize interest groups to attend board meetings." Beyond being a potential violation of the constitutional rights of board members, this would represent an abdication of their duties as elected officials to engage their constituents and advocate for their welfare. This recommendation appears intended to muzzle board members so that the public will be less likely to learn about important board deliberations—such as potential action on this very report. Straitjacketing the speech and advocacy of duly elected board members would be a subversion of the democratic and constitutional values that we as elected officials swear to uphold and defend.

The report's recommendation on Page 10 to make "major contracts" part of closed sessions is perhaps another inelegant wording that nevertheless invites a substantial reduction in public information and curtails participation. The public has a right to understand how their tax dollars are being spent on agency contracts. "Major contracts" is an overbroad category that does not fit the narrow list of items that may be considered at closed sessions of public agencies under the Brown Act. At the very least, "labor contracts" would be a more appropriate term.

More troubling still, the same sentence would authorize closed sessions for "operationally urgent matters." Unlike "major contracts," this category does not appear to correspond to any exemption in the Brown Act whatsoever. The Act permits closed sessions only for the specific subjects it enumerates, and urgency is not among them; §54956.5 permits shortened notice in a genuine emergency but never authorizes closing a meeting that would otherwise be open. Adopting an undefined urgency exception, the scope of which the Board itself would determine, invites the kind of ad hoc closure the Brown Act aims to prevent.

The report's recommendations regarding in-meeting public comment display a stunning disregard for California State law and the United States Constitution. Public agencies

are permitted to adopt reasonable, viewpoint-neutral, per-item time limits on public comments. The report's recommendations fail to meet the letter or spirit of California Gov. Code §54954.3.

The report's recommendation to consolidate all public comment on agenda items to a 20-minute block at the start of the meeting is especially galling. In practice, this would likely mean that important items sometimes receive no public comment (despite the presence of would-be commenters) because comments on other items ran out the clock. It would thus create a perverse incentive to schedule multiple controversial items at a single meeting to limit participation and obfuscate the depth of public concern. Despite the time involved, members of the public must be granted time to speak to each major action item.

The report further recommends that the chair¹ be allowed to restrict speakers who are making "repetitive comments." Under California and federal constitutional law, an individual speaker who is being repetitive (especially in a manner that is disruptive) may be asked to conclude their comments or revise them to be more substantive. But forcing new and different speakers to limit or withhold their comments because they share a majority viewpoint would violate their First Amendment rights. And empowering the chair to restrict comments that concur with those previously given is, by definition, not viewpoint-neutral.

The Draft AC Transit Guiding Principles and Pre-Meeting Check-In in Appendix 2 on page 16 also contains elements that would serve to limit the freedom of speech and action by board members, stating:

I will stay true to the position and motions discussed prior to the board meeting in private discussions as needed, with motions focused on improving a particular topic.

Limiting board members' ability to reconsider their positions and/or make motions consistent with their principled beliefs violates the spirit of dynamic, democratic governance. This recommendation also presupposes what it would mean to be "focused on improving a particular topic." The very purpose of the AC Transit board is to deliberate and sometimes even disagree on what it means to "improve a particular topic."

¹ The report frequently refers to the "chair" or "vice-chair" when it likely intends to refer to the board president or vice president.

Moreover, implicit in this recommendation is the idea that board members are communicating with one another about their positions on upcoming agenda items. Depending on the extent and nature of such communications and possible pre-commitments, this could represent a Brown Act violation. Additionally, the nature of and procedures for a “Pre-Meeting Check-In” are poorly defined and represent another potential violation of the Brown Act, if they result in a quorum of the board meeting outside a publicly accessible meeting or serial communications.

We are further alarmed by recommendations that appear to categorically subordinate elected directors to staff and to board leadership. Page 6 provides that board members “require authorization to speak on behalf of the board with approved talking points” and that, once a vote is taken, “board members will act consistent with the final decision of the board.” Appendix 2 then asks each director to affirm, “I will work with the GM and fellow board members to confirm talking points before speaking with the public or in meetings with elected officials.” Directors are elected by the voters of their wards, not appointed by the General Manager, and they answer to those voters rather than to a communications protocol. Requiring pre-clearance of an elected official's public speech would function as a prior restraint on protected expression; requiring that directors coordinate their positions with one another outside a noticed meeting invites precisely the serial communications the Brown Act forbids. Moreover—even if they must abide by majority decisions—the ability for individual elected representatives to publicly disagree with an action taken by their counterparts is foundational to our system of government.

The report’s recommendations regarding “topic requests” on page 10 would grant excessive power to the “chair and district secretary” as well as any potential “executive committee.” Although it is reasonable to establish some limit on the number of items coming from any particular board member, enabling a board president or district secretary to unilaterally prevent an item from reaching the full board would be anti-democratic. We respectfully urge that section be revised to ensure that pathways for items to reach full board consideration are more fair and impartial.² Consistent procedures and timelines for addressing items must be established. Additionally, we are concerned by the implications of the potential executive committee’s role in “vetting sensitive issues” since that would imply that such a committee might not be fully public, though under the Brown Act, it would need to be.

² For example, the use of a re-weighted range voting (RRV) system can help governing bodies establish priorities, while still ensuring that each member sees at least one of their preferred items prioritized.

In this same section, there is a recommendation that the board conduct monthly, half-hour “Board Briefings.” This risks additional violations of the Brown Act, if such briefings are not open to the public and/or if such briefings result in board members engaging in collective deliberations or serial communications. Similarly, we are concerned by the report’s directive that “Staff questioning should not occur during full board meetings.” This is another example of how the public could be kept in the dark by limiting board members’ ability to elicit information from staff during the most accessible and best-attended meetings of the agency. Offering elected officials an opportunity to publicly ask questions of staff is a common practice on elected bodies.

Finally, given the report’s emphasis (albeit inconsistent) on the Board’s role to attend to high-level strategy and customer satisfaction, we were disconcerted by TWG’s note in the Agenda Planning Pending List (APPL) in the appendices that quarterly customer service metrics should be “internal only” and “not a public report.” Perhaps this relates to finer-grained data that are already internal-only; but given the overall thrust of the report toward less public information and participation and the fact that this appeared to be the only comment with the phrase “not a public report,” our doubts about this recommendation were heightened.

Although there are a variety of other potential issues with the report, this letter reflects our highest level concerns, which we believe must be addressed before the AC Transit Board of Directors can move forward with any reforms to its practices, procedures, and committee structures. It is our hope that with additional community outreach and work by the consultant, this report and its recommendations can be brought in alignment with the values of our community and the rights enshrined in California law and the US Constitution.

Respectfully,

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Ben Bartlett, Berkeley City Councilmember, District 3