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TO: Susan Nabel, Co-Chair, Legislative and Rules Committee of the
Board of Representatives

FROM: Douglas C. Dalena, Esq., Director of Legal Affairs and Corporation Counsel
Michael Toma, Esq., Assistant Corporation Counsel

DATE: March 1, 2022

RE: Proposed Change to Board Rule re: when public may speak on an item

You have asked the Law Department to comment on a proposed change to Section IV.E.3 of the Rules of Order of the Board of Representatives. The current provision states that a member of the public may, at a meeting of the Board, speak about any topic which has not been subject to a prior public hearing of either the Board or a Board committee. The proposal under consideration provides that a member of the public may speak about any topic, including items that have been discussed at a prior public hearing, as long as the speaker did not address the item during a public hearing of either the Board or a Board committee.

For the reasons that follow, adopting the proposed change as it is now worded is not recommended. First, the proposal is inconsistent with the objective of a fair procedure that the current structure is intended to foster. A public hearing is the public's opportunity to offer comment on an item of Board business. Many items on the Board's agenda affect the rights and interests of certain members of the public, who can aptly be called "interested parties." Interested parties, whether they be proponents or opponents of an agenda item, attend the public hearing in order to hear the comments of the Board members, other members of the public, and City staff on that item, so that the interested parties can offer rebuttal comments to support their positions. Currently, interested parties know when discussion will occur on an item by reviewing the public notices of upcoming public hearings. Once a public hearing has been noticed, conducted, and closed, it is reasonable for a member of the public to conclude that there will be no additional public comment, and that the record is complete. Without procedural safeguards in place to

guarantee that all members of the public have notice of the continued opportunity to comment, including the time, location, and topic, allowing public comment on items that have already had hearings could pose legal and fairness concerns. Allowing the public to speak on an item that has already been discussed at a prior public hearing sets up a scenario where an interested party does not have a fair opportunity to hear and respond to a speaker who argues for or against the item, or to rebut assertions of fact made for the first time in the subsequent hearing.

Second, limiting public comment on an agenda item to the public hearing on that item benefits the Board by fostering a more thorough discussion on the topic, as all speakers and interested parties hear and respond to each other's statements. The existing procedure also allows the Board to receive the responses of City staff who attend the public hearing; City staff would not be present to address any comments made by the public at a subsequent meeting of the Board.

Finally, the proposal may not only lead to an unfair process, but in some situations could also lead to unlawful conduct by the Board. In those instances where property rights are affected, the Board must follow certain procedural safeguards in its public hearing process or risk having its action invalidated by a reviewing court. Examples of such instances include review by the Board of action of land use agencies, review of real estate sales and leases, assessing the cost of a public improvement (such as the installation of a sewer line) against property owners, and exercising the power of eminent domain to condemn private property for public use. It is important to note that these are only examples and there might be other examples that implicate property rights or other substantive rights that require heightened due process. Generally, in these types of cases, traditional due process requirements apply, including providing a public hearing upon adequate notice thereof. In the specific area of land use agency action, courts have also held that no evidence "outside the record" may be received and no testimony may be received after the close of the public hearing. Outside the land use context, exceptions might apply if the Board is acting in a legislative capacity, but it would be important to determine when that is the case, and ensure that whenever it is not, proper due process is provided.

In the land use arena, once the public hearing is concluded, the "record is closed." When deliberating on an application, land use agencies must consider only the evidence (consisting of testimony and exhibits) that was entered into the record before the close of the public hearing. It is unlawful to accept testimony or exhibits "outside the record," such as a statement from a member of the public, after the record is closed. See, for example, Frito-Lay, Inc. v. P&Z Comm., 206 Conn. 554 (1988) (allowing comments at land use agency meeting after the public hearing is illegal). The rationale for these holdings is that an applicant has a due process right to hear and rebut all statements relating to its application under consideration by the land use

agency.

While the case law discussed above concerning land use agencies is not applicable to all of the actions of the Board of Representatives, it is generally applicable to items on the Board's agenda that affect property or other substantive rights. Therefore, with respect to those items, the proposed rule change, as written, could open the Board to challenges of its decisions.

It is possible that a rule change could be fashioned that comports with due process for all interested parties and individuals who wish to speak on an item, provided such a rule change is not inconsistent with the Charter or state law. For example, the Board could explore the workability of a rule that leaves the public hearing on an item open for an additional period of time to allow for public comment at a subsequent meeting, while also providing for adequate public notice of the continued public hearing, and clear notice of when the public comment period on a particular item or topic will close. If the Board wished to avoid the difficulty of making distinctions between types of hearings and having different rules apply to each, it could perhaps adopt a standing procedure that all hearings remain open for public comment for a certain period of time, and that the notice of each public hearing provide the additional topics from previous hearings for which public comment remains open.

The Law Department is available to assist the Board if it decides to explore adopting revised language that might address the fairness and due process concerns described herein.