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MEMORANDUM OF LAW

DATE: October 27, 2006

TO: William Anderson, Director
City Planning and Community Investment Department

FROM: City Attorney

SUBJECT: Application of the Brown Act to Meetings of Community Planning Groups
and the Community Planners Committee

INTRODUCTION

In March 2000, this Office issued a Memorandum of Law to the Long Range Community Planning Director of the City of San Diego, concluding that the Ralph M. Brown Act [Act] did not apply to San Diego's recognized Community Planning Groups [CPGs]. In 2006, this Office must reverse this conclusion based on more recent California law that broadens what it means to "create" a legislative body that will be governed by the Act.

The Act is California's "Open Meeting Law." Its purpose is to assist the public's participation in local governmental decisions. To do that it establishes rules to ensure the actions and deliberations of public bodies, including certain advisory bodies, occur openly with public access and input.

Community Planning Groups, recognized by the San Diego City Council, are governed by Council Policy 600-24, first enacted in 1976. Since then, the Policy has been amended four times, most recently in October 2005. All versions of the Council Policy have consistently provided in some manner that: "Community planning groups have been formed and recognized by the City Council to make recommendations to the City Council, Planning Commission, City staff, and other governmental agencies on land use matters, specifically concerning the preparation of, adoption of, implementation of, or amendment to, the General Plan or a land use plan when a plan relates to each recognized community planning group's planning area boundaries." Council Policy 600-24. The Policy's purpose is ". . . to identify responsibilities and to establish minimum operating procedures governing the conduct of planning groups when they operate in their officially recognized capacity." *Ibid*. The most recent amendment of the Policy reinforces this purpose by directing the City Planning Director in consultation with the Community Planners Committee [CPC] to prepare and maintain Administrative Guidelines for the CPGs. The Administrative Guidelines do not currently require specific compliance with the Act, but do require the meetings of the CPGs be open to the public "[i]n the spirit of open

meetings and community participation.” Administrative Guidelines for Implementation of Council Policy 600-24 § 3.2 (April 26, 2006).

The Community Planners Committee [CPC] is governed by Council Policy 600-9. The Policy was enacted in 1970, and amended in 1975. Its express purpose is to “establish a citizens organization responsible in an advisory capacity to the City on those matters related to the General Plan and respective Community Plans.” The CPC is to advise the City Council, Planning Commission, Planning Department, City Manager and other appropriate agencies on those matters related to the General Plan, its amendment, implementation and coordination with Community Plans and related planning and development programs.” It is also asked to make recommendations to appropriate bodies, including the CPGs, to effectuate goals and proposals in the General Plan, and to undertake studies requested by the City Council, Planning Commission and Planning Department. The CPC consists of the chair or other official designee from each of the CPGs.

QUESTION PRESENTED

Does the Ralph M. Brown Act govern the meetings of San Diego’s “recognized” Community Planning Groups and the Community Planners Committee?

SHORT ANSWER

Yes. The recognized Community Planning Groups and the Community Planners Committee are legislative bodies of the City of San Diego. Each body was created by the City Council’s Policy that governs it. Accordingly, the meetings of these legislative bodies are subject to the Ralph M. Brown Act.

DISCUSSION

I. The Ralph M. Brown Act Applies To The Meetings Of Legislative Bodies Of Local Agencies.

The Ralph M. Brown Act was enacted in 1953. Cal. Gov’t Code §§ 54950 – 54963.¹ It specifically requires that “[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided.” § 54953(a). The City of San Diego is a local agency within the meaning of the Act. § 54951.² “Meetings” governed by the Act are further defined as “any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.” § 54952.2(a).

¹ Future section references are to the California Government Code unless indicated otherwise.

² Section 54951 states: “As used in this chapter, ‘local agency’ means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.”

The Act defines what types of groups or entities may be legislative bodies of a local agency in section 54952. The determinative factor is whether the CPGs and the CPC are “legislative bodies” of the City as that term is defined. If they are, their meetings must be governed by the Act.

II. The Brown Act Must Be Broadly Construed.

By its notice and open meeting requirements, the “Act . . . serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies. [Citation].” *Epstein v. Hollywood Entertainment District II*, 87 Cal. App. 4th 862, 868 (2001). Established case law and voter enactments occurring in 2004 also require courts to interpret the Act liberally in favor of openness in conducting public business. *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 917 (2002); Cal. Const. art. I, § 3(b)(2); San Diego Charter § 216.1(b)(2).

III. The Definition of Advisory Legislative Bodies Under The Act.

The main issue is whether the CPGs and CPC meet the legal definition of a legislative body set forth in section 54952(b) of the Act. That section defines a legislative body, in part, as “[a] commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, *created by charter, ordinance, resolution, or formal action of a legislative body.*” [Emphasis added]. Plainly, the CPGs and CPC are advisory bodies to the City Council and to other City Departments. The City Council of San Diego is the legislative body of the City of San Diego. San Diego Charter § 11. The question is whether the City Council legally created these advisory bodies by resolution or formal action.

A. Resolution or Formal Action.

Section 54952(b) requires a City Council to take some action in order to “create” an advisory body that meets the definition of a legislative body. The section provides that action may be by “resolution” or by other “formal” action. The enactment of a formal policy by a legislative body that creates an advisory body also legally qualifies as a “formal action” under the Act. *Frazer v. Dixon Unified School District*, 18 Cal. App. 4th 781, 782 (1993). This Office concludes that either the passage of the resolutions enacting Council Policies 600-24 and 600-9, or the adoption of the Council Policies themselves meet this legal requirement.

B. The Legal Meaning and Definition of “Created By.”

International Longshoremen’s & Warehousemen’s Union v. Los Angeles Export Terminal, Inc., 69 Cal. App. 4th 287 (1999) provided a legal definition for the phrase “created by” as it is used in section 54952 of the Act. In this case, the Los Angeles City Charter gave the City Council the authority to appoint members to the Harbor Commission and to overturn any of its actions. The case involved a lawsuit by a union against a private corporation (LAXT) established with the assistance of the Harbor Department and approval of the Los Angeles Harbor Commission. The court was asked whether this private corporation was a legislative body created by the Los Angeles City Council and therefore subject to the Act.

In holding that it was, the court accepted the common definition of “to create” as meaning “to bring into existence.” *International Longshoremen’s*, 69 Cal. App. 4th at 295 (1999). Significantly, the court did not require the elected legislative body’s participation in the creation process to be exclusive. The City Council needed only to play a role or be involved in bringing the corporation into existence with the Harbor Commission to create the corporation under the Act. *Id.* at 295, 296. The court found the City Council had played such a role because the private corporation could not have been created “without the express or implied approval of the City Council.” The Harbor Department had created the corporation with the Commission’s approval. But the City Council had overall authority over the Harbor Commission, and had acted to approve the Department’s contract with the corporation and to approve an extended lease of City land to be used by the corporation. Thus, the court decided the corporation was “created by” the City Council and subject to the Act.

Epstein v. Hollywood Entertainment District II, 87 Cal. App. 4th 862 (2001) further broadened and clarified the legal meaning of “created by” as used in section 54952. This case involved the Los Angeles City Council’s creation of a Business Improvement District [BID]. Thereafter a group of citizens voluntarily formed a private corporation. The Council designated that corporation to operate the BID. The City Council had no direct or implied authority to appoint any members of the corporation they selected to operate the BID. Yet, the court found the City Council had “created” the corporation within the legal meaning of section 54952. The operative BID, created by the City Council, “was the *raison d’être* for the [corporation]; by giving the BID the legal breath of life, the City breathed life into the [corporation] as well.” *Id.* at 873; *see also*, 85 Op. Cal. Att’y Gen. 55 (2002) [City Council played a role in creating private corporation whose board was appointed by a different agency.]

Based on this legal authority, a City Council creates an advisory body under section 54952(b) if the Council’s formal action or resolution “plays a role” in the creation of the advisory body, it is “involved in” bringing the advisory body into existence, or it creates the *raison d’être* for the advisory body.

IV. The City Council “Created” the Community Planners Committee and the Community Planning Groups.

A. The Recognized Community Planning Groups.

The memorandum of law our Office produced in 2000 concluded that community planning groups do not meet the Act’s definition of a legislative body because the City does not create them or annually appoint their membership, but simply recognizes them.³ However, in 2001, the *Epstein* case clarified that a City Council can “create” a legislative body under the Act, even though the Council does not have the power to appoint members. *See also* 85 Op. Cal. Att’y Gen. 55 (2002) [City Council played a role in creating private corporation whose board

³ The 2000 memorandum also implies the need for some delegation of authority in the creation of an advisory body for it to be a legislative body. We disagree. Section 54952(b) requires no delegation of authority to the legislative bodies it defines. This is in contrast to the legislative bodies defined in section 54952(c)(1)(A), which do require the intent to lawfully delegate authority.

was appointed by a different agency.] The legal test is now much easier to meet. It is simply whether the City Council played a role in the creation of the CPGs. Accordingly, this Office believes a court would conclude the City Council did play a role in the creation of the CPGs when it enacted Council Policy 600-24.

Council Policy 600-24's language sends a mixed message. The Policy concludes that the CPGs are "private organizations." However, it also says the CPGs were "formed and recognized by the City Council." This office concludes the former statement should have no impact on question whether the City Council legally created these advisory bodies. Ultimately, that "is . . . a question of law." *Epstein*, 87 Cal. App. 4th at 876. The requirements for the CPGs set forth in Council Policy 600-24 support the conclusion the City Council played a role in their creation.

Although there is no requirement that the Council appoint members to these groups to meet the legal definition, the Council Policy still requires the City Council to approve the groups' initial members and bylaws by resolution for them to gain "recognized" status. The City Council also sets the purposes for the CPGs' meetings by imposing official duties on them and significantly regulating their conduct in the mandatory minimum bylaws it imposes. The Council retains ultimate authority over the CPGs by reserving to itself the authority to approve the initial members and bylaws of a CPG, without which there is no recognized status; to approve any amendments to a group's bylaws; and to terminate a group's official recognition status. The City Planning Department's website expressly directs citizens who wish to participate in the planning process to form officially-recognized planning groups; the City's Planning Department provides support and training for the groups; and the City has under certain circumstances agreed to indemnify group members who may be sued performing the services they provide to the City.⁴

By creating a sub-set of community planning groups that are officially recognized by the City Council in this Council Policy, the City Council provided their *raison d'être*. When it gave Council Policy 600-24, the "legal breath of life," the City Council also breathed legal life into the CPGs as "legislative bodies" within the meaning of section 54952(b), as the law is currently interpreted. Accordingly, each recognized Community Planning Group meets the definition of a legislative body under the Brown Act and the meetings of each are subject to that Act.

B. The Community Planners Committee.

Council Policy 600-9 was enacted by City Council resolution for the express purpose of establishing the CPC as a City advisory body. The Policy designates the members of the CPC as the chairpersons of, or other members selected by, the CPGs. The body is advisory to the City Council, other City agencies and departments, and to the CPGs. The City Planning Department provides support to this committee. The City Council has the inherent authority to repeal the resolution creating this Policy, and the CPC would cease to exist. *See* 6 McQuillin Mun. Corp. § 21.10 (3rd ed. 2006).

The sole purpose of this Policy, passed by City Council resolution, is to create this committee: without it the CPC would not exist. Council Policy 600-9 did not simply play a role in the committee's creation, it played the only role. Accordingly, this Office concludes the City

⁴ *See* San Diego Ordinance O-17086 (April 25, 1988).

Council created the Community Planners Committee, making it a legislative body within the meaning of section 54952(b) of the Act, and that its meetings are subject to the Act.

V. Standing Committees of the CPGs and the CPC Legislative Bodies.

The Council Policies do not require either the CPGs or the CPC to create standing committees. However, because the CPGs and the CPCs are considered legislative bodies under the Act, if they create standing committees, those committees will also become legislative bodies under section 54952(b), requiring them to meet Act provisions.

The remainder of section 54952(b) provides:

However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

There are two types of committees discussed in this portion of section 54952(b): (1) ad hoc or temporary advisory committees, and (2) standing committees.

Ad hoc committees are *not* subject to the Act's requirements so long as they are advisory only; they are composed solely of members of the legislative body; they consist of less than a quorum of the legislative body; and they have a defined purpose and time frame to accomplish that purpose. *See Joiner v. City of Sebastopol*, 125 Cal. App. 3d 799, 805 (1981)

Standing committees *are* subject to the Act. They are either those committees which have "continuing subject matter jurisdiction" or "a meeting schedule fixed" by some formal action of the legislative body. For example, these could be executive committees, rules committees, budget or finance committees, or any committee designated to meet at a certain regular time by the legislative body. For other examples, please see *The Brown Act: Open Meetings For Legislative Bodies*, Office of the California Attorney General, Civil Law Division (2003) at pages 5 to 6.

CONCLUSION AND RECOMMENDATIONS

The recognized Community Planning Groups created by Council Policy 600-24 and the Community Planning Committee created by Council Policy 600-9 are legislative bodies of the City of San Diego. Thus, their meetings are governed by the provisions of the Ralph M. Brown Act. Should the CPC or any CPG create standing committees, the meetings of those committees must also comply with the Act.

The City Council's creation of these advisory bodies triggered the application of the Brown Act to them and the City Council's repeal of the policies and ordinances involved would end that application. This Office does not recommend that course of action. The CPGs and the CPC provide valuable information and services to the City of San Diego. Their performance and

conduct are enhanced by the requirements set forth in the Council Policies and Administrative Guidelines that have been enacted and promulgated.

The City Attorney recommends the Policies and Guidelines be amended to require the CPGs and the CPC to hold their meetings, the meetings of any executive boards and standing committees, in compliance with the Act. This Office also recommends the Planning Department inform the CPGs and CPC of our conclusion and request they implement procedures to comply with the Act.

The CPGs and CPC already conduct their meetings publicly and comply with many of the Act's requirements. For example, under Council Policy 600-24 the CPGs must prohibit proxy or absentee voting, allow participation of property owners affected by a development and for public comment on any proposed development under review, conduct their business and hold substantive discussions on noticed agenda items in a public setting, and must prohibit serial or secret meetings. This conclusion should not substantially impact the meeting procedures of these bodies.

The Attorney General's excellent free manual "The Brown Act: Open Meetings For Legislative Bodies (2003)" is available at its website <http://caag.state.ca.us/publications/#opengovernment>. This Office will prepare a general summary of the Act's requirements that are not currently required by Council Policy 600-24 to assist in their implementation. This Office will also assist the Planning Department in providing additional guidance to these groups and to the CPC. The City Attorney expects the CPGs and the CPC will substantially comply with the Act's requirements.

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By

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cc: Honorable Mayor Sanders
Councilmembers
Betsy McCullough, Deputy Director

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