AGENDA

GENERAL PLAN WORKING GROUP
REGULAR MEETING – 6:30 P.M

FEBRUARY 24, 2014

Joseph Room
John F. Kennedy Library
505 Santa Clara Street
Vallejo, CA 94590

Tony Adams (Chair)
Patricia Gatz (Vice-Chair)
Jonathan Atkinson
Peggy Cohen-Thompson
Jimmy Genn
Candace Holmes
Marv Kinney
Patricia Kutza
Sarah Nichols
Brendan Riley (Proxy)
Cynthia Ripley
Jim Scoggin
Nathan Daniel Stout
Marian Swanson
Pearl Jones Tranter
Johnny Walker

This AGENDA contains a brief general description of each item to be considered. The posting of the recommended actions does not indicate what action may be taken. If comments come to the General Plan Working Group without prior notice and are not listed on the AGENDA, no specific answers or response should be expected at this meeting per State law.

Agenda Items: Those wishing to address the group on a scheduled agenda item should fill out a speaker card and give it to the Secretary. Speaker time limits for scheduled agenda items are five minutes for designated spokespersons for a group and three minutes for individuals.

Notice of Availability of Public Records: All public records relating to an open session item, which are not exempt from disclosure pursuant to the Public Records Act, that are distributed to a majority of the General Plan Working Group will be available for public inspection at City Hall, 555 Santa Clara St., 2nd Floor, or the Vallejo Public Library, 505 Santa Clara St. at the same time that the public records are distributed or made available to the General Plan Working Group. Such documents may also be available on the City of Vallejo website at www.ci.vallejo.ca.us subject to staff's ability to post the documents prior to the meeting.

Disclosure Requirements: Government Code Section 84308 (d) sets forth disclosure requirements which apply to persons who actively support or oppose projects in which they have a "financial interest", as that term is defined by the Political Reform Act of 1974. If you fall within that category, and if you (or your agent) have made a contribution of $250 or more to any group member within the last twelve months to be used in a federal, state or local election, you must disclose the fact of that contribution in a statement to the group.

Appeal Rights: The applicant or any party adversely affected by the decision of the General Plan Working Group may, within ten days after the rendition of the decision of the General Plan Working Group, appeal in writing to the City Council by filing a written appeal with the City Clerk. Such written appeal shall state the reason or reasons for the appeal and why the applicant believes he or she is adversely affected by the decision of the General Plan Working Group. Such appeal shall not be timely filed unless it is actually received by the City Clerk or designee no later than the close of business on the tenth calendar day after the rendition of the decision of the General Plan Working Group. If such date falls on a weekend or City holiday, then the deadline shall be extended until the next regular business day.

Notice of the appeal, including the date and time of the City Council's consideration of the appeal, shall be sent by the City Clerk to all property owners within two hundred or five hundred feet of the project boundary, whichever was the original notification boundary.

The Council may affirm, reverse or modify any decision of the General Plan Working Group which is appealed. The Council may summarily reject any appeal upon determination that the appellant is not adversely affected by a decision under appeal.

If any party challenges the General Plan Working Group's actions on any of the following items, they may be limited to raising only those issues they or someone else raised at the public hearing described in this agenda or in written correspondence delivered to the Secretary of the General Plan Working Group.

	The John F. Kennedy Library is ADA compliant. Devices for the hearing impaired are available from the City Clerk. Requests for disability related modifications or accommodations, aids or services may be made by a person with a disability to the City Clerk's office no less than 72 hours prior to the meeting as required by Section 202 of the Americans with Disabilities Act of 1990 and the federal rules and regulations adopted in implementation thereof.

If you have any questions regarding any of the following agenda items, please call the assigned planner or project manager at (707) 648-4326.

1. CALL TO ORDER

2. PLEDGE OF ALLEGIANCE

3. ROLL CALL

4. APPROVAL OF THE MINUTES

A. None

5. REPORT OF THE SECRETARY

A. Written Communications

B. Introductions

i. Mark Hoffheimer, Senior Planner

ii. Cynthia Ripley, New Appointee to GPWG from Beautification and Design Review Board (BDRB) – Resignation of Kathy O'Hare as BDRB appointee to GPWG

C. Individual GPWG Interviews: Scheduling

D. Upcoming Meetings:
April 14, 2014: Public Workshop Report

6. CITY ATTORNEY REPORT: None.

7. REPORT OF THE PRESIDING OFFICER and MEMBERS OF THE GENERAL PLAN WORKING GROUP

A. Report of the Presiding Officer and/or Members of the General Plan Working Group

B. General Plan Working Group Liaison to Planning Commission

C. General Plan Working Group Liaison to City Council

8. REPORT OF EXTERNAL LIAISONS

A. Planning Commission Liaison to General Plan Working Group

B. City Council Liaison to General Plan Working Group

9. CONSENT CALENDAR AND APPROVAL OF THE AGENDA

Consent Calendar items appear below, with the Secretary's or City Attorney's designation as such. Members of the public wishing to address the group on Consent Calendar items are asked to address the Secretary and submit a completed speaker card prior to the approval of the agenda. Such requests shall be granted, and items will be addressed in the order in which they appear in the agenda. After making any changes to the agenda, the agenda shall be approved.

All matters are approved under one motion unless requested to be removed for discussion by a group member or any member of the public.

10. GENERAL PLAN WORKING GROUP DISCUSSION

A. Ralph M. Brown Act Training – Assistant City Attorney Inder Khalsa

B. Sonoma Boulevard Specific Plan/Formation of Sonoma Boulevard Specific Plan Working Group

11. PUBLIC OUTREACH INITIATIVES AND NEXT STEPS

A. Community Workshops – Schedule
B. Website Launch
C. Postcard/Bookmark
D. Public Outreach "Toolkit"
E. Other Means of Public/Community Engagement
F. Next Steps

12. COMMUNITY FORUM

Anyone wishing to address the group on any matter for which another opportunity to speak is not provided on the agenda, and which is within the jurisdiction of the group to resolve, is requested to submit a completed speaker card to the Secretary. When called upon, each speaker should step to the podium, state his/her name and address for the record. The conduct of the community forum shall be limited to a maximum of fifteen (15) minutes, with each speaker limited to three minutes pursuant to Vallejo Municipal Code Section 2.20.300. The group may take information but may not take action on any item not on the agenda.

13. OTHER

A. Confirm next GPWG Meetings
B. Background Documents to be provided to the GPWG - (Planning Manager)

i. Ahwahnee Principles – Brochure (Full documents at http://www.lgc.org/about/ahwahnee)
ii. Guide to California Planning (excerpts)
iii. Project Management Plan (to be sent electronically)

14. ADJOURNMENT

Item 10A

OPEN & PUBLIC IV:

A Guide to the Ralph M. Brown Act

—2ND EDITION, REVISED JULY 2010—

LEAGUE OF CALIFORNIA CITIES

ACKNOWLEDGEMENTS

The League thanks the following individuals for their work on this update to the original publication:

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CHAPTER 1:
IT IS THE PEOPLE'S BUSINESS

TABLE OF CONTENTS

OPEN & PUBLIC IV

A GUIDE TO THE RALPH M. BROWN ACT

OPEN & PUBLIC IV:

A GUIDE TO THE RALPH M. BROWN ACT, 2ND EDITION

Revised July 2010

FOREWORD

The goal of this publication is to explain the requirements of the Ralph M. Brown Act, California's open meeting law, in lay language so that it can be readily understood by local government officials and employees, the public and the news media. We offer practical advice—especially in areas where the Brown Act is unclear or has been the subject of controversy—to assist local agencies in complying with the requirements of the law.

A number of organizations representing diverse views and constituencies have contributed to this publication in an effort to make it reflect as broad a consensus as possible among those who daily interpret and implement the Brown Act. The League thanks the following organizations for their contributions:

Association of California Healthcare Districts
Association of California Water Agencies
California Association of Sanitation Agencies (CASA)
California Attorney General—Department of Justice
City Clerks Association of California
California Municipal Utilities Association
California Redevelopment Association
California School Boards Association
California Special Districts Association
California State Association of Counties
Community College League of California
California First Amendment Project
California Newspaper Publishers Association
Common Cause
League of Women Voters of California

This publication is current as of June 2010. Updates to the publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment.

This publication is not intended to provide legal advice. A public agency's legal counsel is responsible for advising its governing body and staff and should always be consulted when legal issues arise.

To improve the readability of this publication:

- Most text will look like this;
- Practice tips are in the margins;
- Hypothetical examples are printed in blue; and
- Frequently asked questions, along with our answers, are in shaded text.

Additional copies of this publication may be purchased by visiting CityBooks online at www.cacities.org/store.

CHAPTER 1:
IT IS THE PEOPLE'S BUSINESS

THE RIGHT OF ACCESS

Two key parts of the Brown Act have not changed since its adoption in 1953. One is the Brown Act's initial section, declaring the Legislature's intent:

> *"In enacting this chapter, the Legislature finds and declares that the public commissions, boards, and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."*
>
> *"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."*[1]

Practice Tip:

The key to the Brown Act is a single sentence. In summary, all meetings shall be **open and public** except when the Brown Act authorizes otherwise.

The people reconfirmed that intent 50 years later in the November 2004 election by adopting Proposition 59, amending the California Constitution to include a public right of access to government information:

> *"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."*[2]

The Brown Act's other unchanged provision is a single sentence:

> *"All 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 in this chapter."*[3]

That one sentence is by far the most important of the entire Brown Act. If the opening is the soul, that sentence is the heart of the Brown Act.

BROAD COVERAGE

The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly-elected members of a legislative body, even before they take office.

Similarly, meetings subject to the Brown Act are not limited to face-to-face gatherings. They also include any communication medium or device through which a majority of a legislative body discusses, deliberates or takes action on an item of business outside of a noticed meeting. They include meetings held from remote locations by teleconference.

New communication technologies present new Brown Act challenges. For example, common e-mail practices of forwarding or replying to messages can easily lead to a serial meeting prohibited by the Brown Act, as can participation by members of a legislative body in an Internet chatroom or blog dialogue. Communicating during meetings using electronic technology (such as laptop computers, personal digital assistants, or cellular telephones) may create the perception that private communications are influencing the outcome of decisions; some state legislatures have banned the practice. On the other hand, widespread cablecasting and web streaming of meetings has greatly expanded public access to the decision-making process.

Practice Tip:

Think of the government's house as being made of glass. The curtains may be drawn only to further the public's interest.

NARROW EXEMPTIONS

The express purpose of the Brown Act is to assure that local government agencies conduct the public's business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules.[4]

Generally, public officials should think of themselves as living in glass houses, and that they may only draw the curtains when it is in the public interest to preserve confidentiality. Closed sessions may be held only as specifically authorized by the provisions of the Brown Act itself.

The Brown Act, however, is limited to meetings among a majority of the members of multi-member government bodies when the subject relates to local agency business. It does not apply to independent conduct of individual decision-makers. It does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the members of a body don't discuss issues related to their local agency's business. Meetings of temporary advisory committees—as distinguished from standing committees—made up solely of less than a quorum of a legislative body are not subject to the Brown Act.

The law does not apply to local agency staff or employees, but they may facilitate a violation by acting as a conduit for discussion, deliberation, or action by the legislative body.[5]

The law, on the one hand, recognizes the need of individual local officials to meet and discuss matters with their constituents. On the other hand, it requires—with certain specific exceptions to protect the community and preserve individual rights—that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

PUBLIC PARTICIPATION IN MEETINGS

In addition to requiring the public's business to be conducted in open, noticed meetings, the Brown Act also extends to the public the right to participate in meetings. Individuals, lobbyists, and members of the news media possess the right to attend, record, broadcast, and participate in public meetings. The public's participation is further enhanced by the Brown Act's requirement that a meaningful agenda be posted in advance of meetings, by limiting discussion and action to matters listed on the agenda, and by requiring that meeting materials be made available.

Legislative bodies may, however, adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and irrelevant speech.

CONTROVERSY

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media and government watchdogs often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.

Public officials complain that the Brown Act makes it difficult to respond to constituents and requires public discussions of items better discussed privately—such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act inconsistent with their private business experiences. Closed meetings can be more efficient; they eliminate grandstanding and promote candor. The techniques that serve well in business—the working lunch, the sharing of information through a series of phone calls or emails, the backroom conversations and compromises—are often not possible under the Brown Act.

As a matter of public policy, California (along with many other states) has concluded that there is more to be gained than lost by conducting public business in the open. Government behind closed doors may well be efficient and business-like, but it may be perceived as unresponsive and untrustworthy.

Practice Tip:

Transparency is a foundational value for ethical government practices. The Brown Act is a floor, not a ceiling, for conduct.

BEYOND THE LAW—GOOD BUSINESS PRACTICES

Violations of the Brown Act can lead to invalidation of an agency's action, payment of a challenger's attorney's fees, public embarrassment, even criminal prosecution. But the Brown Act is a floor, not a ceiling for conduct of public officials. This guide is focused not only on the Brown Act as a minimum standard, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, when an agency conducts too much of its business in closed session or discusses matters in closed session that are beyond the authorized scope, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices and requirements for greater access to meetings for itself and its subordinate committees and bodies that are more stringent than the law itself requires.[6] Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act doesn't provide full guidance. As with the adoption of any other significant policy, public comment should be solicited.

A local policy could build on these basic Brown Act goals:

- A legislative body's need to get its business done smoothly;
- The public's right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time;
- A local agency's right to confidentially address certain negotiations, personnel matters, claims and litigation; and
- The right of the press to fully understand and communicate public agency decision-making.

An explicit and comprehensive public meeting and information policy, especially if reviewed periodically, can be an important element in maintaining or improving public relations. Such a policy exceeds the absolute requirements of the law—but if the law were enough this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. An agency should consider going beyond the law, and look at its unique circumstances and determine if there is a better way to prevent potential problems and promote public trust. At the very least, local agencies need to think about how their agendas are structured in order to make Brown Act compliance easier. They need to plan carefully to make sure public participation fits smoothly into the process.

Practice Tip:

The Brown Act should be viewed as a tool to facilitate the business of local government agencies. Local policies that go beyond the minimum requirements of law may help instill public confidence and avoid problems.

■ ACHIEVING BALANCE

The Brown Act should be neither an excuse for hiding the ball nor a mechanism for hindering efficient and orderly meetings. The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for openness in local government, yet should allow government to function responsively and productively.

There must be both adequate notice of what discussion and action is to occur during a meeting as well as a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

■ HISTORICAL NOTE

In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on "Your Secret Government" that ran in May and June 1952.

Out of the series came a decision to push for a new state open meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted such a bill and Assembly Member Ralph M. Brown agreed to carry it. The Legislature passed the bill and Gov. Earl Warren signed it into law in 1953.

The Ralph M. Brown Act, known as the "Brown Act", has evolved under a series of amendments and court decisions, and has been the model for other open meeting laws—such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Assembly Member Brown is best known for the open meeting law that carries his name. He was elected to the Legislature in 1942 and served 19 years, including the last three years as Speaker. He then became an appellate court justice.

Endnotes

1 California Government Code section 54950

2 California Constitution, Art. 1, section 3 (b)(1)

3 California Government Code section 54953 (a)

4 This principle of broad construction when it furthers public access and narrow construction if a provision limits public access is also stated in the amendment to the state's Constitution adopted by Proposition 59 in 2004. California Constitution, Art. 1, section 3(b)(2)

5 California Government Code section 54952.2 (c); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533

6 California Government Code section 54953.7

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment. A current version of the Brown Act may be found at www.leginfo.ca.gov.

CHAPTER 2:
LEGISLATIVE BODIES

WHAT IS A "LEGISLATIVE BODY" OF A LOCAL AGENCY?

WHAT IS NOT A "LEGISLATIVE BODY" FOR PURPOSES OF THE BROWN ACT?

CHAPTER 2:
LEGISLATIVE BODIES

The Brown Act applies to the legislative bodies of local agencies. It defines "legislative body" broadly to include just about every type of decision-making body of a local agency.[1]

WHAT IS A "LEGISLATIVE BODY" OF A LOCAL AGENCY?

A "legislative body" includes:

- **The "governing body** of a local agency or any other local body created by state or federal statute."[2] This includes city councils, boards of supervisors, school boards and boards of trustees of special districts. A "local agency" is any city, county, school district, municipal corporation, redevelopment agency, district, political subdivision, or other public agency.[3] A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.[4] The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.[5] Entities created pursuant to joint powers agreements are local agencies within the meaning of the Brown Act.[6]
- **Newly-elected members** of a legislative body who have not yet assumed office must conform to the requirements of the Brown Act as if already in office.[7] Thus, meetings between incumbents and newly-elected members of a legislative body, such as a meeting between two outgoing members and a member-elect of a five-member body, could violate the Brown Act.

Q. On the morning following the election to a five-member legislative body of a local agency, two successful candidates, neither an incumbent, meet with an incumbent member of the legislative body for a celebratory breakfast. Does this violate the Brown Act?

A. *It might, and absolutely would if the conversation turns to agency business. Even though the candidates-elect have not officially been sworn in, the Brown Act applies. If purely a social event, there is no violation but it would be preferable if others were invited to attend to avoid the appearance of impropriety.*

Practice Tip:

The prudent presumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

- **Appointed bodies**—whether permanent or temporary, decision-making or advisory—including planning commissions, civil service commissions and other subsidiary committees, boards, and bodies. Volunteer groups, executive search committees, task forces, and "blue ribbon committees" created by formal action of the governing body are legislative bodies. When the members of two or more legislative bodies are appointed to serve on an entirely separate advisory group, the resulting body may be subject to the Brown Act. In one reported case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a legislative body subject to the Brown Act. Had the two committees remained separate and met only to exchange information, they would have been exempt from the Brown Act.[8]
- **Standing committees** of a legislative body, irrespective of their composition, which have either: (1) a continuing subject matter jurisdiction, or (2) a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body.[9] Even if comprised of less than a quorum of the governing body, a standing committee is subject to the Brown Act. For example, if a governing body creates long-term committees on budget and finance or on public safety, those are standing committees subject to the Brown Act. Further, function over form controls. For example, a statement by the legislative body that "the advisory committee shall not exercise continuing subject matter jurisdiction" or the fact that the committee does not have a fixed meeting schedule is not determinative.[10] "Formal action" by a legislative body includes authorization given to the agency's executive officer to appoint an advisory committee pursuant to agency-adopted policy.[11]
- The governing body of any **private organization** either: (1) created by the legislative body in order to exercise authority that may lawfully be delegated by such body to a private corporation, limited liability company or other entity or (2) that receives agency funding and whose governing board includes a member of the legislative body of the local agency appointed by the legislative body as a full voting member of the private entity's governing board.[12] These include some nonprofit corporations created by local agencies.[13] If a local agency contracts with a private firm for a service (for example, payroll, janitorial, or food services), the private firm is not covered by the Brown Act.[14] When a member of a legislative body sits on a board of a private organization as a private person and is not appointed by the legislative body, the board will not be subject to the Brown Act. Similarly, when the legislative body appoints someone other than one of its own members to such boards, the Brown Act does not apply. Nor does it apply when a private organization merely receives agency funding.[15]

Q: The local chamber of commerce is funded in part by the city. The mayor sits on the chamber's board of directors. Is the chamber board a legislative body subject to the Brown Act?

A: *Maybe. If the chamber's governing documents require the mayor to be on the board and the city council appoints the mayor to that position, the board is a legislative body. If, however, the chamber board independently appoints the mayor to its board, or the mayor attends chamber board meetings in a purely advisory capacity, it is not.*

Q: If a community college district board creates an auxiliary organization to operate a campus bookstore or cafeteria, is the board of the organization a legislative body?

A: *Yes. But, if the district instead contracts with a private firm to operate the bookstore or cafeteria, the Brown Act would not apply to the private firm.*

Practice Tip:

It can be difficult to determine whether a subcommittee of a body falls into the category of a standing committee or an exempt temporary committee. Suppose a committee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration. Is it an exempt temporary committee or a non-exempt standing committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee's charge, or whether the committee exists long enough to have "continuing jurisdiction."

- **Certain kinds of hospital operators**. A lessee of a hospital (or portion of a hospital) first leased under Health and Safety Code subsection 32121(p) after Jan. 1, 1994, which exercises "material authority" delegated to it by a local agency, whether or not such lessee is organized and operated by the agency or by a delegated authority.[16]

WHAT IS NOT A "LEGISLATIVE BODY" FOR PURPOSES OF THE BROWN ACT?

- A temporary advisory committee **composed solely of less than a quorum** of the legislative body that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed is not subject to the Brown Act.[17] Temporary committees are sometimes called *ad hoc* committees, a term not used in the Brown Act. Examples include an advisory committee composed of less than a quorum created to interview candidates for a vacant position or to meet with representatives of other entities to exchange information on a matter of concern to the agency, such as traffic congestion.[18]
- Groups advisory to a single decision-maker or appointed by staff are not covered. The Brown Act applies only to committees created by formal action of the legislative body and not to committees created by others. A committee advising a superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the school board, would be covered.[19]

Q. A member of the legislative body of a local agency informally establishes an advisory committee of five residents to advise her on issues as they arise. Does the Brown Act apply to this committee?

A. *No, because the committee has not been established by formal action of the legislative body.*

Q. During a meeting of the city council, the council directs the city manager to form an advisory committee of residents to develop recommendations for a new ordinance. The city manager forms the committee and appoints its members; the committee is instructed to direct its recommendations to the city manager. Does the Brown Act apply to this committee?

A. *Possibly, because the direction from the city council might be regarded as a formal action of the body notwithstanding that the city manager controls the committee.*

- Individual decision makers who are not elected or appointed members of a legislative body are not covered by the Brown Act. For example, a disciplinary hearing presided over by a department head or a meeting of agency department heads are not subject to the Brown Act since such assemblies are not those of a legislative body.[20]
- County central committees of political parties are also not Brown Act bodies.[21]

Endnotes

1 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123

2 California Government Code section 54952(a)

3 California Government Code section 54951. *But see:* Education Code section 35147, which exempts certain school councils and school site advisory committees from the Brown Act and imposes upon them a separate set of rules.

4 *Torres v. Board of Commissioners* (1979) 89 Cal.App.3d 545

5 71 Ops.Cal.Atty.Gen. 96 (1988); 73 Ops.Cal.Atty.Gen. 1 (1990)

6 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354

7 California Government Code section 54952.1

8 *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799

9 California Government Code section 54952(b)

10 79 Ops. Cal.Atty.Gen. 69 (1996)

11 *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781

12 California Government Code section 54952(c)(1)(B). The same rule applies to a full voting member appointed prior to February 9, 1996 who, after that date, is made a non-voting board member by the legislative body. California Government Code section 54952(c)(2)

13 California Government Code section 54952(c)(1)(A); *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal.App.4th 287; *Epstein v. Hollywood Entertainment Dist. II Business Improvement District* (2001) 87 Cal.App.4th 862; *see also:* 81 Ops.Cal.Atty.Gen. 281 (1998); 85 Ops.Cal.Atty.Gen. 55

14 *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal.App.4th 287, 300 fn. 5

15 "The Brown Act," California Attorney General (2003), p. 7

16 California Government Code section 54952(d)

17 California Government Code section 54952(b); *see also: Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821

18 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123

19 56 Ops.Cal.Atty.Gen. 14 (1973)

20 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870

21 59 Ops.Cal.Atty.Gen. 162 (1976)

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CHAPTER 3:
MEETINGS

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The Brown Act only applies to meetings of local legislative bodies. The Brown Act defines a meeting 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."[1] Under the Brown Act, the term "meeting" is not limited to gatherings at which action is taken but includes deliberative gatherings as well.

BROWN ACT MEETINGS

Brown Act gatherings include a legislative body's regular meetings, special meetings, emergency meetings and adjourned meetings.

- "Regular meetings" are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.[2]
- "Special meetings" are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act's notice requirements for special meetings.[3]
- "Emergency meetings" are a limited class of meetings held when prompt action is needed due to actual or threatened disruption of public facilities and are held on little notice.[4]
- "Adjourned meetings" are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.[5]

SIX EXCEPTIONS TO THE MEETING DEFINITION

The Brown Act creates six exceptions to the meeting definition: [6]

Individual Contacts

The first exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff or a colleague.

Individual contacts, however, cannot be used to do in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation or action among a majority of the members of a legislative body is prohibited. Such serial meetings are discussed below.

Conferences

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, so long as those meetings are open to the public. However, a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency's subject matter jurisdiction.

Community Meetings

The third exception allows a legislative body majority to attend an open and publicized meeting held by another organization to address a topic of local community concern. Again, a majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency's subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates' night if the meetings are open to the public.

> "I see we have four distinguished members of the city council at our meeting tonight," said the chair of the Environmental Action Coalition.
>
> "I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?"
>
> *The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if a majority discusses, deliberates, or takes action on an item during the meeting of the other organization. There is a fine line between what is permitted and what is not; hence, members should exercise caution when participating in these types of events.*

Q. The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for re-election and all three participate. All of the candidates are asked their views of a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question?

A. *Yes, because the Brown Act does not constrain the incumbents from expressing their views regarding important matters facing the local agency as part of the political process the same as any other candidates.*

Other Legislative Bodies

The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of: (1) another body of the local agency and (2) a legislative body of another local agency.[7] Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their local agency's subject matter jurisdiction. This exception allows, for example, a city council or a majority of a board of supervisors to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation. Further, aside from the Brown Act, there may be other reasons, such as due process considerations, why the members should avoid giving public testimony or trying to influence the outcome of proceedings before a subordinate body.

Q. The entire legislative body intends to testify against a bill before the Senate Local Government Committee in Sacramento. Must this activity be noticed as a meeting of the body?

A. *No, because the members are attending and participating in an open meeting of another governmental body which the public may attend.*

Q. The members then proceed upstairs to the office of their local Assembly member to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public?

A. *Yes, because the entire body may not meet behind closed doors except for proper closed sessions. The same answer applies to a private lunch or dinner with the Assembly member.*

Standing Committees

The fifth exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body, provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting).[8]

Q. The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?

A. *She may attend, but only as an observer; she may not participate.*

Social or Ceremonial Events

The sixth and final exception permits a majority of a legislative body to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the local agency.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception, or farewell. The test is not whether a majority of a legislative body attends the function, but whether business of a specific nature within the subject matter jurisdiction of the local agency is discussed. So long as no local agency business is discussed, there is no violation of the Brown Act.

COLLECTIVE BRIEFINGS

None of these six exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements.

RETREATS OR WORKSHOPS OF LEGISLATIVE BODIES

There is consensus among local agency attorneys that gatherings by a majority of legislative body members at the legislative body's retreats, study sessions, or workshops are covered under the Brown Act. This is the case whether the retreat, study session, or workshop focuses on long-range agency planning, discussion of critical local issues, or on team building and group dynamics.[9]

Q. The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors?

A. *No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.*

SERIAL MEETINGS

One of the most frequently asked questions about the Brown Act involves serial meetings. At any one time, such meetings involve only a portion of a legislative body, but eventually involve a majority.

The problem with serial meetings is the process, which deprives the public of an opportunity for meaningful participation in legislative body decision-making. The Brown Act provides that "[a] majority of the members of a legislative body shall not, outside a meeting…use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."[10]

The serial meeting may occur by either a "daisy-chain" or a "hub-and-spoke" sequence. In the daisy-chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated or taken action on an item within the legislative body's subject matter jurisdiction. The hub-and-spoke process involves, for example, a staff member (the hub) communicating with members of a legislative body (the spokes) one-by-one for a decision on a proposed action,[11] or a chief executive officer briefing a majority of redevelopment agency members prior to a formal meeting and, in the process, information about the members' respective views is revealed. Each of these scenarios violates the Brown Act.

A legislative body member has the right, if not the duty, to meet with constituents to address their concerns. That member also has the right to confer with a colleague or appropriate staff about local agency business. An employee or official of a local agency may engage in separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."[12]

The Brown Act has been violated however, if several one-on-one meetings or conferences leads to a discussion, deliberation or action by a majority. In one case, a violation occurred when a quorum of a city council directed staff by letter on an eminent domain action.[13]

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.[14] Such a memo, however, may be a public record.[15]

The phone call was from a lobbyist. "Say, I need your vote for that project in the south area. How about it?"

"Well, I don't know," replied Board Member Aletto. "That's kind of a sticky proposition. You sure you need my vote?"

"Well, I've got Bradley and Cohen lined up and another vote leaning. With you I'd be over the top."

Moments later, the phone rings again. "Hey, I've been hearing some rumbles on that south area project," said the newspaper reporter. "I'm counting noses. How are you voting on it?"

Neither the lobbyist nor the reporter has violated the Brown Act, but they are facilitating a violation. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members' positions by asking "You sure you need my vote?" The prudent course is to avoid such leading conversations and to caution lobbyists, staff and news media against revealing such positions of others.

Practice Tip:

When briefing legislative body members, staff must exercise care not to disclose other members' views and positions.

The mayor sat down across from the city manager. "From now on," he declared, "I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don't want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting."

Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."[16] Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation or action taken among the majority of the legislative body.

"Thanks for the information," said Council Member Kim. "These zoning changes can be tricky, and now I think I'm better equipped to make the right decision."

"Glad to be of assistance," replied the planning director. "Any idea what the other council members think of the problem?"

The planning director should not ask, and the member should not answer. A one-on-one meeting that involves communicating the comments or position of other members violates the Brown Act.

Q. The agency's Web site includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?

A. *Yes, because it is a technological device that may serve to allow for a majority of members to discuss, deliberate or take action on matters of agency business.*

Q. A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?

A. *No, the Brown Act expressly allows this kind of communication, though the members should avoid discussing the merits of what is to be taken up at the meeting.*

Particular care should be exercised when staff briefings of legislative body members occur by email because of the ease of using the "reply to all" button that may inadvertently result in a Brown Act violation.

INFORMAL GATHERINGS

Often members are tempted to mix business with pleasure—for example, by holding a post meeting gathering. Informal gatherings at which local agency business is discussed or transacted violate the law if they are not conducted in conformance with the Brown Act.[17] A luncheon gathering in a crowded dining room violates the Brown Act if the public does not have an adequate opportunity to hear or participate in the deliberations of members.

> Thursday at 11:30 a.m., as they did every week, the board of directors of the Dry Gulch Irrigation District trooped into Pop's Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board.
>
> *A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues. But it is the kind of situation that should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive's presence in no way lessens the potential for a violation of the Brown Act.*

Q. The agency has won a major victory in the Supreme Court on an issue of importance. The presiding officer decides to hold an impromptu press conference in order to make a statement to the print and broadcast media. All the other members show up in order to make statements of their own and be seen by the media. Is this gathering illegal?

A. *Technically there is no exception for this sort of gathering, but as long as members do not state their intentions as to future action to be taken and the press conference is open to the public, it seems harmless.*

TECHNOLOGICAL CONFERENCING

In an effort to keep up with information age technologies, the Brown Act now specifically allows a legislative body to use any type of teleconferencing to meet, receive public comment and testimony, deliberate, or conduct a closed session.[18] While the Brown Act contains specific requirements for conducting a teleconference, the decision to use teleconferencing is entirely discretionary within the body.

"Teleconference" is defined as "a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both."[19] In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following specific requirements:[20]

- Teleconferencing may be used for all purposes during any meeting;
- At least a quorum of the legislative body must participate from locations within the local agency's jurisdiction;
- Additional teleconference locations may be made available for the public;

Practice Tip:

Legal counsel for the local agency should be consulted before teleconferencing a meeting.

- Each teleconference location must be specifically identified in the notice and agenda of the meeting, including a full address and room number, as may be applicable;
- Agendas must be posted at each teleconference location, even if a hotel room or a residence;
- Each teleconference location must be accessible to the public and have technology, such as a speakerphone, to enable the public to participate;
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location; and
- All votes must be by roll call.

Q. A member on vacation wants to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C. to New York. May she?

A. *She may not participate or vote because she is not in a noticed and posted teleconference location.*

The use of teleconferencing to conduct a legislative body meeting presents a variety of new issues beyond the scope of this guide to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

LOCATION OF MEETINGS

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.[21]

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is one of the following:

- Comply with state or federal law or a court order, or for a judicial conference or administrative proceeding in which the local agency is a party;
- Inspect real or personal property, which cannot be conveniently brought into the local agency's territory, provided the meeting is limited to items relating to that real or personal property;

Q. The agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

A. *Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be able to attend.*

- Participate in multiagency meetings or discussions, however, such meetings must be held within the boundaries of one of the participating agencies, and all involved agencies must give proper notice;
- Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries or at its principal office if that office is located outside the territory over which the agency has jurisdiction;

- Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction;
- Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility; or
- Visit the office of its legal counsel for a closed session on pending litigation, when to do so would reduce legal fees or costs.[22]

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential employee from another district.[23] A school board may also interview members of the public residing in another district if the board is considering employing that district's superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.[24]

Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.[25]

Endnotes:

1 California Government Code section 54952.2(a)
2 California Government Code section 54954(a)
3 California Government Code section 54956
4 California Government Code section 54956.5
5 California Government Code section 54955
6 California Government Code section 54952.2(c)
7 California Government Code section 54952.2(c)(4)
8 California Government Code section 54952.2(c)(6)
9 "The Brown Act," California Attorney General (2003), p. 10
10 California Government Code section 54952.2(b)(1)
11 *Stockton Newspaper Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95
12 California Government Code section 54952.2(b)(2)
13 *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518
14 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
15 California Government Code section 54957.5(a)
16 California Government Code section 54952.2(b)(2)
17 California Government Code section 54952.2; 43 Ops.Cal.Atty.Gen. 36 (1964)
18 California Government Code section 54953(b)(1)
19 California Government Code section 54953(b)(4)
20 California Government Code section 54953
21 California Government Code section 54954(b)
22 California Government Code section 54954(b)(1)-(7)
23 California Government Code section 54954(c)
24 California Government Code section 54954(d)
25 California Government Code section 54954(e)

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CHAPTER 4:
AGENDAS, NOTICES, AND PUBLIC PARTICIPATION

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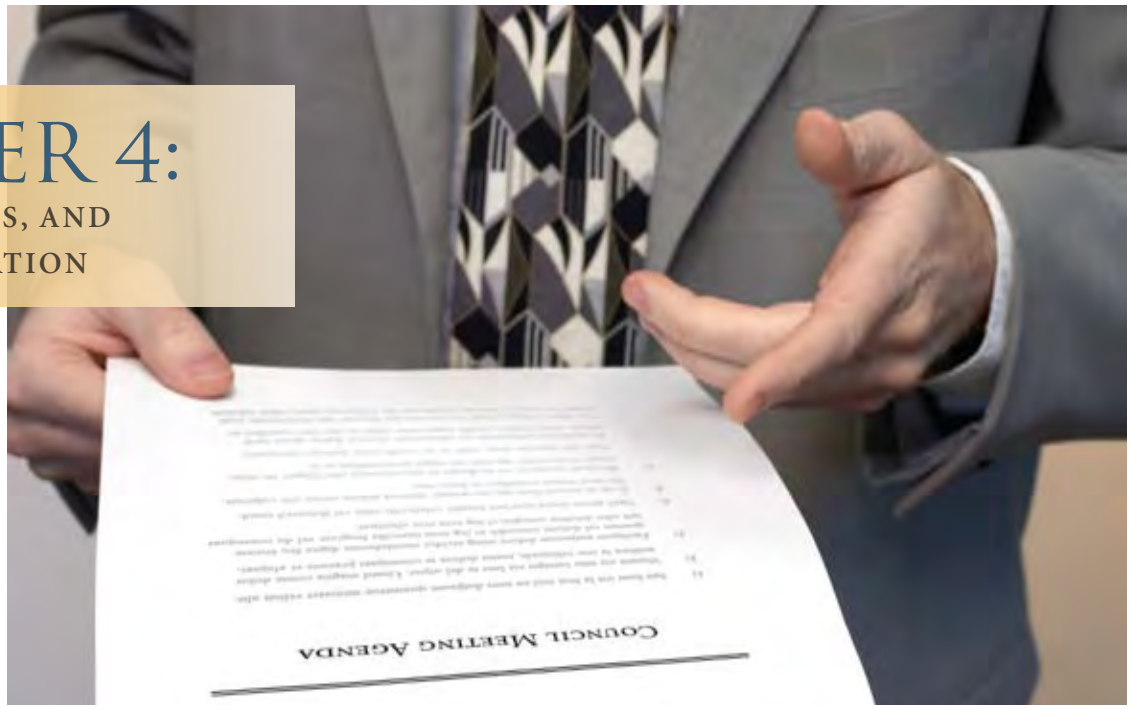

Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if nobody knows about the meeting.

AGENDAS FOR REGULAR MEETINGS

Every regular meeting of a legislative body of a local agency—including advisory committees, commissions, or boards, as well as standing committees of legislative bodies—must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

Practice Tip:
Putting together a meeting agenda requires careful thought.

The agenda must be posted at least 72 hours before the regular meeting in a location "freely accessible to members of the public."[1] The courts have not definitively interpreted the "freely accessible" requirement. The California Attorney General has interpreted this provision to require posting in locations accessible to the public 24 hours a day during the 72-hour period, but any of the 72 hours may fall on a weekend.[2] Posting may also be made on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period.[3] However, only posting an agenda on an agency's Web site is inadequate since there is no universal access to the internet. The agenda must state the meeting time and place and must contain "a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session."[4]

Q. The agenda for a regular meeting contains the following items of business:

- "Consideration of a report regarding traffic on Eighth Street"
- "Consideration of contract with ABC Consulting"

Are these descriptions adequate?

A. *If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read "consideration of a contract with ABC Consulting in the amount of $50,000 for traffic engineering services regarding traffic on Eighth Street."*

Q. The agenda includes an item entitled "City Manager's Report," during which time the city manager provides a brief report on notable topics of interest, none of which are listed on the agenda.

Is this permissible?

A. *Yes, so long as it does not result in extended discussion or action by the body.*

A brief general description may not be sufficient for closed session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions. Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.

MAILED AGENDA UPON WRITTEN REQUEST

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted. If requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

A request for notice is valid for one calendar year and renewal requests must be filed Jan. 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.[5]

NOTICE REQUIREMENTS FOR SPECIAL MEETINGS

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed. Written notice must be sent to each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation, and radio or television station that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting.

The notice must state the time and place of the meeting, as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda—with a brief general description. As noted above, closed session items should be described in accordance with the Brown Act's safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements. The special meeting notice must also be posted at least 24 hours prior to the special meeting in a site freely accessible to the public. The body cannot consider business not in the notice.[6]

NOTICES AND AGENDAS FOR ADJOURNED AND CONTINUED MEETINGS AND HEARINGS

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.[7] If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.[8] A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.[9]

NOTICE REQUIREMENTS FOR EMERGENCY MEETINGS

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.[10] News media that have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However, the news media must be notified as soon as possible of the meeting and any action taken.

News media may make a practice of having written requests on file for notification of special or emergency meetings. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings—although notification may be advisable in any event to avoid controversy.

EDUCATIONAL AGENCY MEETINGS

The Education Code contains some special agenda and special meeting provisions,[11] however, they are generally consistent with the Brown Act. An item is probably void if not posted.[12] A school district board must also adopt regulations to make sure the public can place matters affecting district's business on meeting agendas and to address the board on those items.[13]

NOTICE REQUIREMENTS FOR TAX OR ASSESSMENT MEETINGS AND HEARINGS

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased general tax or assessment.[14] At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days notice of a public hearing at which public testimony may be given before the legislative body proposes to act on the tax or assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.[15]

The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of the Constitution.[16] As a practical matter, the Constitution's notice requirements have preempted this section of the Brown Act.

NON-AGENDA ITEMS

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda:[17]

- When a majority decides there is an "emergency situation" (as defined for emergency meetings);
- When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action and the need to take action "came to the attention of the local agency subsequent to the agenda being posted." This exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A new need does not arise because staff forgot to put an item on the agenda or because an applicant missed a deadline; or
- When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

Practice Tip:

Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted agenda.

The exceptions are narrow, as indicated by this list. The first two require a specific determination by the legislative body. That determination can be challenged in court and, if unsubstantiated, can lead to invalidation of an action.

"I'd like a two-thirds vote of the board, so we can go ahead and authorize commencement of phase two of the East Area Project," said Chair Lopez.

"It's not on the agenda. But we learned two days ago that we finished phase one ahead of schedule—believe it or not—and I'd like to keep it that way. Do I hear a motion?"

The desire to stay ahead of schedule generally would not satisfy "a need for immediate action." Too casual an action could invite a court challenge by a disgruntled resident. The prudent course is to place an item on the agenda for the next meeting and not risk invalidation.

"We learned this morning of an opportunity for a state grant," said the chief engineer at the regular board meeting, "but our application has to be submitted in two days. We'd like the board to give us the go ahead tonight, even though it's not on the agenda."

A legitimate immediate need can be acted upon even though not on the posted agenda by following a two-step process:

- First, make two determinations: (a) that there is an immediate need to take action and (b) that the need arose after the posting of the agenda. The matter is then placed on the agenda.
- Second, discuss and act on the added agenda item.

RESPONDING TO THE PUBLIC

The public can talk about anything within the jurisdiction of the legislative body, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?

While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to "briefly respond" to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back, request to place a matter on the agenda for a subsequent meeting (subject to the body's rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on his or her own activities.[18] However, caution should be used to avoid any discussion or action on such items.

Council Member A: I would like staff to respond to Resident Joe's complaints during public comment about the repaving project on Elm Street—are there problems with this project?

City Manager: The public works director has prepared a 45-minute power point presentation for you on the status of this project and will give it right now.

Council Member B: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.

It is clear from this dialogue that the Elm Street project was not on the council's agenda, but was raised during the public comment period for items not on the agenda. Council Member A properly asked staff to respond; the city manager should have given at most a brief response. If a lengthy report from the public works director was warranted, the city manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the council in a matter that is not listed on the agenda.

THE RIGHT TO ATTEND AND OBSERVE MEETINGS

A number of other Brown Act provisions protect the public's right to attend, observe, and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise "fulfill any condition precedent" to attending a meeting. Any attendance list, questionnaire, or similar document posted at or near the entrance to the meeting room or circulated at a meeting must clearly state that its completion is voluntary and that all persons may attend whether or not they fill it out.[19]

No meeting can be held in a facility that prohibits attendance based on race, religion color, national origin, ethnic group identification, age, sex, sexual orientation, or disability, or that is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present.[20] This does not mean however that the public is entitled to free entry to a conference attended by a majority of the legislative body.[21]

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.[22]

Action by secret ballot, whether preliminary or final, is flatly prohibited.[23]

Q: The agenda calls for election of the legislative body's officers. Members of the legislative body want to cast unsigned written ballots that would be tallied by the clerk, who would announce the results. Is this voting process permissible?

A: *No. The possibility that a public vote might cause hurt feelings among members of the legislative body or might be awkward—or even counterproductive—does not justify a secret ballot.*

There can be no semi-closed meetings, in which some members of the public are permitted to attend as spectators while others are not; meetings are either open or closed.[24]

The legislative body may remove persons from a meeting who willfully interrupt proceedings. If order still cannot be restored, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to re-admit an individual or individuals not responsible for the disturbance.[25]

RECORDS AND RECORDINGS

The public has the right to review agendas and other writings distributed by any person to a majority of the legislative body in connection with a matter subject to discussion or consideration at a meeting. Except for privileged documents, those materials are public records and must be made available upon request without delay.[26] A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.[27]

Q: In connection with an upcoming hearing on a discretionary use permit, counsel for the legislative body transmits a memorandum to all members of the body outlining the litigation risks in granting or denying the permit. Must this memorandum be included in the packet of agenda materials available to the public?

A: *No. The memorandum is a privileged attorney-client communication.*

Q: In connection with an agenda item calling for the legislative body to approve a contract, staff submits to all members of the body a financial analysis explaining why the terms of the contract favor the local agency. Must this memorandum be included in the packet of agenda materials available to the public?

A. *Yes. The memorandum has been distributed to the majority of the legislative body, relates to the subject matter of a meeting, and is not a privileged communication.*

A legislative body may discuss or act on some matters without considering written materials. But if writings are distributed to a majority of a legislative body in connection with an agenda item, they must also be available to the public. A writing distributed to a majority of the legislative body less than 72 hours before the meeting must be made available for inspection at the time of distribution at a public office or location designated for that purpose; and the agendas for all meetings of the legislative body must include the address of this office or location.[28] A writing distributed during a meeting must be made public:

- At the meeting if prepared by the local agency or a member of its legislative body; or
- After the meeting if prepared by some other person.[29]

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is subject to the Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency.[30] The agency may impose its ordinary charge for copies.[31]

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting to record the proceedings, absent a reasonable finding by the legislative body that noise, illumination, or obstruction of view caused by recorders or cameras would persistently disrupt the proceedings.[32]

Similarly, a legislative body cannot prohibit or restrict the public broadcast of its open and public meetings without making a reasonable finding that the noise, illumination, or obstruction of view would persistently disrupt the proceedings.[33]

THE PUBLIC'S PLACE ON THE AGENDA

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration of it.[34]

Q. Must the legislative body allow members of the public to show videos or make a power point presentation during the public comment part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?

A. *Probably, although the agency is under no obligation to provide equipment.*

Practice Tip:

Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker's desire for anonymity.

Moreover, the legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself. But, the Brown Act provides no immunity for defamatory statements.[35]

Q. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

A. *No, as long as the criticism pertains to job performance.*

Q. During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

A. *There is no case law on this subject. Some would argue that campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section because it is relevant to the governing of the agency and an implicit criticism of the incumbents.*

The legislative body may adopt reasonable regulations, including time limits, on public comments. Such regulations should be enforced fairly and without regard to speakers' viewpoints. The legislative body has discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or lengthened to allow additional time for discussion on a complicated matter.[36]

The public does not need to be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a public meeting, if all interested members of the public had the opportunity to speak on the item before or during its consideration, and if the item has not been substantially changed.[37]

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.[38]

Endnotes

1 California Government Code section 54954.2(a)(1)
2 78 Ops.Cal.Atty.Gen. 327 (1995)
3 88 Ops.Cal.Atty.Gen. 218 (2005)
4 California Government Code section 54954.2(a)(1)
5 California Government Code section 54954.1
6 California Government Code section 54956
7 California Government Code section 54955
8 California Government Code section 54954.2(b)(3)
9 California Government Code section 54955.1
10 California Government Code section 54956.5
11 Education Code sections 35144, 35145 and 72129
12 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196
13 California Education Code section 35145.5
14 California Government Code section 54954.6
15 California Government Code section 54954.6(g)
16 See: Cal.Const.Art.XIIIC, XIIID and California Government Code section 54954.6(h)
17 California Government Code section 54954.2(b)
18 California Government Code section 54954.2(a)(2)
19 California Government Code section 54953.3
20 California Government Code section 54961(a); California Government Code section 11135(a)
21 California Government Code section 54952.2(c)(2)
22 California Government Code section 54953(b)
23 California Government Code section 54953(c)
24 46 Ops.Cal.Atty.Gen. 34 (1965)
25 California Government Code section 54957.9
26 California Government Code section 54957.5
27 California Government Code section 54957.5(d)
28 California Government Code section 54957.5(b)
29 California Government Code section 54957.5(c)
30 California Government Code section 54953.5(b)
31 California Government Code section 54957.5(d)
32 California Government Code section 54953.5(a)
33 California Government Code section 54953.6
34 California Government Code section 54954.3(a)
35 California Government Code section 54954.3(c)
36 California Government Code section 54954.3(b); *Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal. App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992)
37 California Government Code section 54954.3(a)
38 California Government Code section 54954.3(a)

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment. A current version of the Brown Act may be found at www.leginfo.ca.gov.

CHAPTER 5:
CLOSED SESSIONS

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The Brown Act begins with a strong statement in favor of open meetings; private discussions among a majority of a legislative body are prohibited, unless expressly authorized under the Brown Act. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter must be discussed in public. As an example, a board of police commissioners cannot generally meet in closed session, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.[1]

Practice Tip:

Meetings are either open or closed. There is no "in between."

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session. Individuals who do not have an official role in advising the legislative body on closed session subject matters must be excluded from closed session discussions.[2]

Q. May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer?

A. *No, attendance in closed sessions is reserved exclusively for the agency's advisors.*

In general, the most common purpose of a closed session is to avoid revealing confidential information that may, in specified circumstances, prejudice the legal or negotiating position of the agency or compromise the privacy interests of employees. Closed sessions should be conducted keeping those narrow purposes in mind.

In this chapter, the grounds for convening a closed session are called "exceptions" because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, the Brown Act does not authorize closed sessions for general contract negotiations.

AGENDAS AND REPORTS

Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption. An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly agendized as a closed session or unless it is properly added as a closed session item by a two-thirds vote of the body after making the appropriate urgency findings.

The Brown Act supplies a series of fill-in-the-blank sample, agenda descriptions for various types of authorized closed sessions, which provide a "safe harbor" from legal attacks. These sample agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multi-jurisdictional drug cases, hospital boards of directors, and medical quality assurance committees.[3]

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.[4]

Following a closed session the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report varies according to the reason for the closed session.[5] The announcements may be made at the site of the closed session, so long as the public is allowed to be present to hear them.

If there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session, if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.[6]

The Brown Act does not require minutes, including minutes of closed session. A confidential "minute book" may be kept to record actions taken at closed sessions.[7] If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict of interest.[8] A court may order the disclosure of minute books for the court's review if a lawsuit makes sufficient claims of an open meeting violation.

Practice Tip:

Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may do well to resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

Practice Tip:

Pay close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session.

LITIGATION

There is an attorney/client relationship, and legal counsel may use it for privileged written and verbal communications—outside of meetings—to members of the legislative body. But protection of the attorney/client privilege cannot by itself be the reason for a closed session.[9]

The Brown Act expressly authorizes closed sessions to discuss what is considered litigation. The rules that apply to holding a litigation closed session involve complex, technical definitions and procedures. The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is a party.[10] The litigation exception under the Brown Act is narrowly construed and does not permit activities beyond a legislative body's conferring with its own legal counsel. For example, it is not permissible to hold a closed session in which settlement negotiations take place between a legislative body and an adverse party or to hold a closed session for the purpose of participation in a mediation.[11]

The California Attorney General believes that if the agency's attorney is not a participant, a litigation closed session cannot be held.[12] In any event, local agency officials should always consult the agency's attorney before placing this type of closed session on the agenda, in order to be certain that it is being done properly.

Litigation that may be discussed in closed session includes the following three types of matters:

Existing litigation

Q. May the legislative body agree to settle a lawsuit in a properly-noticed closed session, without placing the settlement agreement on an open session agenda for public approval?

A. *Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.*

In general, the most common purpose of a closed session is to avoid revealing confidential information that may, in specified circumstances, prejudice the legal or negotiating position of the agency or compromise the privacy interests of employees. Closed sessions should be conducted keeping those narrow purposes in mind.

Grounds for convening a closed session in this chapter are called "exceptions" because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. It is improper in these cases, to convene a closed session, even to protect confidential information. For example, the Brown Act does not authorize closed sessions for general contract negotiations.

Existing litigation includes any adjudicatory proceedings before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops, or to consider alternatives for resolution of the case. Generally, an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation that requires actions that are subject to public hearings cannot be approved in closed session.[13]

Threatened litigation against the local agency

Closed sessions are authorized for legal counsel to inform the legislative body of specific facts and circumstances that suggest that the local agency has significant exposure to litigation. The Brown Act lists six separate categories of such facts and circumstances.[14] The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff.

Initiation of litigation by the local agency

A closed session may be held under the pending litigation exception when the legislative body seeks legal advice on whether to protect the agency's rights and interests by initiating litigation.

In certain cases, the circumstances and facts justifying the closed session must be publicly noticed on the agenda or announced at an open meeting. Before holding a closed session under the pending litigation exception, the legislative body must publicly state which of the three basic situations apply. It may do so simply by making a reference to the posted agenda.

Certain actions must be reported in open session at the same meeting following the closed session. Other actions, as where final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person. Each agency attorney should be aware of and should make other disclosures that may be required in specific instances.

■ REAL ESTATE NEGOTIATIONS

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange, or lease of real property by or for the local agency. A "lease" includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body's negotiator on price and terms of payment.[15] Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues such as site design, architecture, or other aspects of the project for which the transaction is contemplated.[16]

Q. May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

A. *No. However, there are differing opinions over the scope of the phrase "price and terms of payment" in connection with real estate closed sessions. Many agency attorneys believe that any term that directly affects the economic value of the transaction falls within the ambit of "price and terms of payment." Others take a narrower, more literal view of the phrase.*

The agency's negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiator, the real property that the negotiations may concern and the names of the persons with whom its negotiator may negotiate.[17]

After real estate negotiations are concluded, the approval and substance of the agreement must be reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval as soon as informed of it. Once final, the substance of the agreement must be disclosed to anyone who inquires.

"Our population is exploding, and we have to think about new school sites," said Board Member Jefferson.

"Not only that," interjected Board Member Tanaka, "we need to get rid of a couple of our older facilities."

"Well, obviously the place to do that is in a closed session," said Board Member O'Reilly. "Otherwise we're going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar."

A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites—which must be identified at an open and public meeting.

PUBLIC EMPLOYMENT

The Brown Act authorizes a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee."[18] The purpose of this exception—commonly referred to as the "personnel exception"—is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.[19] The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.[20] That authority may be delegated to a subsidiary appointed body.[21]

An employee must be given at least 24 hours notice of any closed session convened to hear specific complaints or charges against him or her. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.[22] If the employee is not given notice, any disciplinary action is null and void.[23]

Practice Tip:

Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

Q. Must 24 hours notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?

A. *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. The Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.[24]

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee.[25] An incorrect agenda description can result in invalidation of an action and much embarrassment.

For purposes of the personnel exception, "employee" specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, district general manager or superintendent. An example of the latter is a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception.[26] Action on individuals who are not "employees" must also be public—including discussing and voting on appointees to committees, or debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter), yet another example of the importance of using correct agenda descriptions.

Practice Tip:

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay.

Reclassification of a job must be public, but an employee's ability to fill that job may be considered in closed session. Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position.[27] However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.[28]

> "I have some important news to announce," said Mayor Garcia. "We've decided to terminate the contract of the city manager, effective immediately. The council has met in closed session and we've negotiated six months severance pay."
>
> "Unfortunately, that has some serious budget consequences, so we've had to delay phase two of the East Area Project."
>
> *This may be an improper use of the personnel closed session if the council agenda described the item as the city manager's evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution should be exercised to not discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.*

Q. The school board is meeting in closed session to evaluate the superintendent and to consider giving her a pay raise. May the superintendent attend the closed session?

A. *The superintendent may attend the portion of the closed session devoted to her evaluation, but may not be present during discussion of her pay raise. Discussion of the superintendent's compensation in closed session is limited to giving direction to the school board's negotiator. Also, the clerk should be careful to notice the closed session on the agenda as both an evaluation and a labor negotiation.*

LABOR NEGOTIATIONS

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

Practice Tip:

Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members,[29] on employee salaries and fringe benefits for both union and non-union employees. For represented employees, it may also consider working conditions that by law require negotiation. These sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

During its discussions with representatives on salaries and fringe benefits, the legislative body may also discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.[30]

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.[31] The labor sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees. For purposes of this prohibition, an "employee" includes an officer or an independent contractor who functions as an officer or an employee. Independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.

LABOR NEGOTIATIONS—SCHOOL AND COMMUNITY COLLEGE DISTRICTS

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Rodda Act:

(1) A negotiating session with a recognized or certified employee organization;

(2) A meeting of a mediator with either side;

(3) A hearing or meeting held by a fact finder or arbitrator; and

(4) A session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.[32]

Public participation under the Rodda Act also takes another form.[33] All initial proposals of both sides must be presented at public meetings and are public records. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.[34] The final vote must be in public.

OTHER EDUCATION CODE EXCEPTIONS

The Education Code governs student disciplinary meetings by boards of school districts and community college districts. District boards may hold a closed session to consider the suspension or discipline of a student, if a public hearing would reveal personal, disciplinary, or academic information about the student contrary to state and federal pupil privacy law. The student's parent or guardian may request an open meeting.[35]

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.[36] Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.[37]

GRAND JURY TESTIMONY

A legislative body, including its members as individuals, may testify in private before a grand jury, either individually or as a group.[38] Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act, since the body would not be meeting to make decisions or reach a consensus on issues within the body's subject matter jurisdiction.

Practice Tip:

Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

LICENSE APPLICANTS WITH CRIMINAL RECORDS

A closed session is permitted when an applicant, who has a criminal record, applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license. If the body decides to deny the license, the applicant may withdraw the application. If the applicant does not withdraw, the body must deny the license in public, immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.[39]

PUBLIC SECURITY

Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings, essential public services, including water, sewer, gas, or electric service, or to the public's right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with designated security or law enforcement officials including the Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.[40] Action taken in closed session with respect to such public security issues is not reportable action.

MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT AGENCY

A joint powers agency formed to provide drug law enforcement services to multiple jurisdictions may hold closed sessions to discuss case records of an on-going criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.[41]

The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.[42]

HOSPITAL PEER REVIEW AND TRADE SECRETS

Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals, under other provisions of law.[43]

1. A meeting to hear reports of hospital medical audit or quality assurance committees, or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.
2. A meeting to discuss "reports involving trade secrets"—provided no action is taken.

A "trade secret" is defined as information which is not generally known to the public or competitors and which: (1) "derives independent economic value, actual or potential" by virtue of its restricted knowledge; (2) is necessary to initiate a new hospital service or program or facility; and (3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district's dissolution.[44]

THE CONFIDENTIALITY OF CLOSED SESSION DISCUSSIONS

It is not uncommon for agency officials to complain that confidential information is being leaked from closed sessions. The Brown Act prohibits the disclosure of confidential information acquired in a closed session by any person present and offers various remedies to address willful breaches of confidentiality.[45] It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.[46] Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.[47]

Practice Tip:

There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.

Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long believed that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is "improper" for officials to disclose information received during a closed session regarding pending litigation,[48] though the Attorney General has also concluded that a local agency may not go so far as to adopt an ordinance criminalizing public disclosure of closed session discussions.[49] In any event, the Brown Act now prescribes remedies for breaches of confidentiality. These include injunctive relief, disciplinary action against an employee, and referral of a member of the legislative body to the grand jury.[50]

The duty of maintaining confidentiality, of course, must give way to the obligation to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, the Brown Act exempts from its prohibition against disclosure of closed session communications disclosure of closed session information to the district attorney or the grand jury due to a perceived violation of law, expressions of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action, and disclosing information that is not confidential.[51]

The interplay between these possible sanctions and an official's first amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

> "I want the press to know that I voted in closed session against filing the eminent domain action," said Council Member Chang.
>
> "Don't settle too soon," reveals Council Member Watson to the property owner, over coffee. "The city's offer coming your way is not our bottom line."
>
> *The first comment to the press is appropriate—the Brown Act requires that certain final votes taken in closed session be reported publicly.[52] The second comment to the property owner is not—disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.*

Endnotes

1 61 Ops.Cal.Atty.Gen. 220 (1978)
2 82 Ops.Cal.Atty.Gen. 29 (1999)
3 California Government Code section 54954.5
4 California Government Code sections 54956.9 and 54957.7
5 California Government Code section 54957.1(a)
6 California Government Code section 54957.1(b)
7 California Government Code section 54957.2
8 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal.Code Regs. section 18702.1(c)
9 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
10 California Government Code section 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).
11 *Page v. Miracosta Community College District* (2009) 180 Cal.App.4th 471
12 "*The Brown Act,*" California Attorney General (2003), p. 40
13 *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172
14 Government Code section 54956.9(b)
15 California Government Code section 54956.8
16 *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 172; see also __ Ops.Cal.Atty.Gen.__ (May 21, 2010) (2010 WL 2150433) (concluding it is impermissible for a redevelopment agency to meet in closed session to discuss the terms of a rehabilitation loan to a business that was leasing property from the agency when the terms and conditions of the lease itself were not also a matter of discussion.)
17 California Government Code section 54956.8
18 California Government Code section 54957(b)
19 63 Ops.Cal.Atty.Gen. 215 (1980); but see: *Duvall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session).
20 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002)
21 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty.Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.
22 *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860
23 California Government Code section 54957
24 78 Ops.Cal.Atty.Gen. 218 (1995); Bell v. Vista Unified School District (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87
25 *Moreno v. City of King* (2005) 127 Cal.App.4th 17
26 California Government Code section 54957
27 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165
28 California Government Code section 54957.1(a)(5)

29 California Government Code section 54957.6
30 57 Ops.Cal.Atty.Gen. 209 (1974)
31 California Government Code section 54957.1(a)(6)
32 California Government Code section 3549.1
33 California Government Code section 3540
34 California Government Code section 3547
35 California Education Code section 48918, but see *Rim of the World Unified School District v. Superior Court* (2003) 104 Cal.App.4th 1393 (Section 48918 preempted by the Federal Family Educational Right and Privacy Act in regard to expulsion proceedings.)
36 California Education Code section 72122
37 California Education Code section 60617
38 California Government Code section 54953.1
39 California Government Code section 54956.7
40 California Government Code section 54957
41 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354
42 California Government Code section 54957.8
43 California Government Code section 54962
44 California Health and Safety Code section 32106
45 Government Code section 54963
46 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327; *see also:* California Government Code section 54963
47 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
48 80 Ops.Cal.Atty.Gen. 231 (1997)
49 76 Ops.Cal.Atty.Gen. 289 (1993)
50 California Government Code section 54963
51 California Government Code section 54963
52 California Government Code section 54957.1

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment. A current version of the Brown Act may be found at www.leginfo.ca.gov.

CHAPTER 6:
REMEDIES

INVALIDATION

CIVIL ACTION TO PREVENT FUTURE VIOLATIONS

COSTS AND ATTORNEY'S FEES

CRIMINAL COMPLAINTS

VOLUNTARY RESOLUTION

CHAPTER 6:
REMEDIES

Certain violations of the Brown Act are designated as misdemeanors, although by far the most commonly used enforcement provisions are those that authorize civil actions to invalidate specified actions taken in violation of the Brown Act and to stop or prevent future violations. Still, despite all the safeguards and remedies to enforce them, it is ultimately impossible for the public to monitor every aspect of public officials' interactions. Compliance ultimately results from regular training and a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

INVALIDATION

Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the BrownAct.[1] Violations of the Brown Act, however, cannot be invalidated if they involve the following types of actions:

- Those taken in substantial compliance with the law;
- Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
- Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
- Those connected with the collection of any tax; or
- Those in which the complaining party had actual notice at least 72 hours prior to the meeting at which the action is taken.

Before filing a court action seeking invalidation, a person who believes that a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action, the nature of the claimed violation, and the "cure" sought. This demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session but in violation of Section 54954.2, which requires (subject to specific exceptions) that only properly agendized items are acted on by the governing body during a meeting.[2] The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days.

The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and to weigh its options before litigation is filed. The Brown Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and to start over.

Although just about anyone has standing to bring an action for invalidation,[3] the challenger must show prejudice as a result of the alleged violation.[4] An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.[5]

Practice Tip:

A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options.

CIVIL ACTION TO PREVENT FUTURE VIOLATIONS

The district attorney or any interested person can file a civil action asking the court to:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body of a local agency;
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body;
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law; or
- Compel the legislative body to tape record its closed sessions.

It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future where the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.[6] Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.[7]

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to tape record its future closed sessions. In a subsequent lawsuit to enforce the Brown Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant portion of the closed session recording.

COSTS AND ATTORNEY'S FEES

Someone who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act's civil remedies may seek court costs and reasonable attorney's fees. Courts have held that attorney's fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.[8] When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorneys fees will be awarded against the agency if a violation of the Act is proven.

An attorney fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney's fees if the court finds the lawsuit was clearly frivolous and lacking in merit.[9]

Practice Tip:

Attorney's fees will likely be awarded if a violation of the Brown Act is proven.

CRIMINAL COMPLAINTS

A violation of the Brown Act by a member of the legislative body who acts with the improper intent described below is punishable as a misdemeanor.[10]

A criminal violation has two components. The first is that there must be an overt act—a member of a legislative body must attend a meeting at which action is taken in violation of the Brown Act.[11]

"Action taken" is not only an actual vote, but also a collective decision, commitment or promise by a

majority of the legislative body to make a positive or negative decision.[12] If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.[13] In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act—not whether that member has voted with the majority or minority, or has voted at all.

The second component of a criminal violation is that action is taken with the intent of a member "to deprive the public of information to which the member knows or has reason to know the public is entitled" by the Brown Act.[14]

As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies' adherence to the requirements of the law.

Practice Tip:

Training and exercising good judgment can help avoid Brown Act conflicts. If an arguably meritorious procedural challenge is raised, it may be more prudent to voluntarily re-notice and reconsider the action subject to the challenge.

VOLUNTARY RESOLUTION

Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy residents fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down. The district attorney or even the grand jury occasionally becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body. There are times when it may be preferable to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

At bottom, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.

Endnotes

1 California Government Code section 54960.1. Invalidation is limited to actions that violate the following sections of the Brown Act: section 54953 (the basic open meeting provision); sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); and 54956 (special meetings). Violations of sections not listed above cannot give rise to invalidation actions, but are subject to the other remedies listed in section 5490.1.

2 California Government Code section 54960.1 (b) and (c)(1)

3 *McKee v. Orange Unified School District* (2003) 110 Cal.App.4th 1310

4 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556, 571

5 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1117-18

6 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524. *Accord Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 916 & fn.6

7 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334-36

8 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal.App.4th 1313, 1324-27 and cases cited therein.

9 California Government Code section 54960.5

10 California Government Code section 54959. A misdemeanor is punishable by a fine of up to $1,000 or up to six months in county jail, or both. California Penal Code section 19. Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.

11 California Government Code section 54959

12 California Government Code section 54952.6

13 61 Ops.Cal.Atty.Gen.283 (1978)

14 California Government Code section 54959

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Item 10B

City of VALLEJO California

MEMORANDUM

PLANNING DIVISION

DATE: February 24, 2014

TO: General Plan Working Group

FROM: Andrea Ouse, Planning Manager
Mark Hoffheimer, Senior Planner

SUBJECT: Item 10B - Sonoma Boulevard Specific Plan and Working Group

The Specific Plan Working Group (SPWG) will be a subcommittee of approximately five seated General Plan Working Group members. Its role is to provide feedback and recommendations to City staff and the consultant team in preparing the Sonoma Boulevard Specific Plan. Specific Plan Working Group members will meet with City staff and the consultant team at key milestones during the planning process to provide direction and advice regarding the Specific Plan.

What are the responsibilities of the SPWG?

- Provide feedback and recommendations to staff and the consultant team at key milestones during the preparation of the Specific Plan.
- Attend and participate in design charrettes and working sessions with staff, the consultant team, and the general public.
- Provide updates to the General Plan Working Group on the progress of the Specific Plan.
- Communicate information about the Specific Plan to other Vallejo residents and encourage friends, neighbors, and colleagues to participate in the public outreach events.

What's the Specific Plan all about?

The goal of the Specific Plan is to establish an easy-to-use framework for near-term and long-term public and private reinvestment along Sonoma Boulevard between Curtola Parkway and Redwood. The Specific Plan follows the 2010 Corridor Design Plan which established a vision for Sonoma Boulevard as a multi-modal, vibrant, corridor friendly to pedestrians, bicycles, and transit.

The Specific Plan will build upon the visions and recommendations made in the Sonoma Boulevard Corridor Design Plan to test, consider, and discuss implementable projects within the project area, and will function to implement many of its recommendations.

It will provide the opportunity to explore both potential public projects, such as more detailed roadway cross sections, intersections, and gateway designs, as well as potential private projects, such as the detailed built form and character of new development that might occur along the corridor, with a particular emphasis on opportunity sites. It will provide an anticipated program buildout for the corridor and consider the extent and amount of infrastructure needed to achieve it. Finally, it will amend existing zoning to provide clear and concise, form-based standards that will work to remove existing regulatory barriers where appropriate and provide an environment more conducive to private investment and development.

The plan will build upon the phasing and implementation strategies discussed in the Corridor Design Plan. This can include both short-term improvements (e.g. where and how can temporary or "easy" things such as roadway striping, "tactical" urbanism strategies such as pop-ups, public art projects, parklets, be

implemented?) and longer term improvements that might need to be phased over time (e.g. "Mixed-Use Incubation" between Redwood and Couch – what does this really mean, what does this look like, and what would the detailed steps be to achieve this?).

Should I participate?

Specific Plan Working Group Members should ideally demonstrate one or more of the following:

1. Knowledge of, and connection to, the Sonoma Boulevard corridor.
2. Interest in implementing the vision for Sonoma Boulevard as a pedestrian and bicycle-friendly multimodal corridor in keeping with the Corridor Design Plan.
3. Interest in the form and character of the Sonoma Boulevard corridor, either with regards to streetscape and public realm elements (gateways, streetlights, etc.) and/or with regards to buildings lining the corridor.
4. Interest in the form and character of the neighborhoods abutting the project area, and how they connect and transition, now and in the future, to the corridor.
5. Interest in the economic revitalization of the corridor.
6. Interest in transit, both short-term and long-term.

Next Steps?

Staff will ask for nominations of five GPWG members to serve as the Sonoma Boulevard Working Group.

Help Chart Vallejo's Course

Community Outreach for the Vallejo Planning Initiatives Project

Starting with the Guiding Principles that will shape the rest of the effort, we are reaching out the community at large to invite everyone to have a voice in the process. In March, there will be a series of four public workshops at locations across the city, a companion online forum, and targeted outreach activities to a variety of groups, including youth, seniors, and faith-based organizations. All Vallejoans are invited to speak up about the vision and values that define the kind of community we want.

This memo summarizes the key steps in the outreach process and identifies workshop dates, times and locations. As ambassadors for the General Plan Update, we need your help to get the word out in the community. Please invite your friends, family, neighbors and colleagues to participate and have their say. On Monday night, we'll provide you with postcards promoting the upcoming workshops and the online forum. Please hand them in your neighborhood or leave them at local coffee shops or gathering spots where people are likely to see them.

Also, on Monday night please bring the name and contact details (including email address) for three community groups and/or individuals that you think it will be important to involve in the process. Hand over the contact information to Andrea or email it ahead of time. We will add them to the project mailing list and make sure they know how and when to get involved, now and going forward.

Community workshop details:

Wednesday March 5th	Wednesday March 12th	Saturday March 15th	Wednesday March 19th
6:30 to 8:30pm	6:30 to 8:30pm	10:00am to 12:00pm	6:30 to 8:30pm
Glen Cove Elementary	Elks Lodge	Loma Vista Elementary	Florence Douglas Senior Center
501 Glen Cove Pkwy	2850 Redwood Pkwy	146 Rainier Ave	333 Amador St

Online forum: **www.propelvallejo.com/open-city-hall**

The Ahwahnee Principles

for Resource-Efficient Communities

The Ahwahnee Principles for Resource-Efficient Communities, written in 1991 by the Local Government Commission, paved the way for the Smart Growth movement and New Urbanism.

These principles provide a blueprint for elected officials to create compact, mixed-use, walkable, transit-oriented developments in their local communities. Cities and counties across the nation have adopted them to break the cycle of sprawl.

If you like the newly emerging downtowns across the nation – full of people, activities and great public spaces – that's the Ahwahnee Principles in action.

Since then, the Ahwahnee Principles for Economic Development in 1997 and the Ahwahnee Water Principles in 2005 have been developed to complement this pioneering vision.

- *The authors of the Ahwahnee Principles include: Peter Calthorpe, Michael Corbett, Andres Duany, Elizabeth Moule, Elizabeth Plater-Zyberk and Stefanos Polyzoides, with editors: Peter Katz, Judy Corbett and Steve Weissman.*

- **www.lgc.org/ahwahnee/principles.html**

Local Government Commission

The Ahwahnee Principles

Preamble

Existing patterns of urban and suburban development seriously impair our quality of life.

The symptoms are: more congestion and air pollution resulting from our increased dependence on automobiles, the loss of precious open space, the need for costly improvements to roads and public services, the inequitable distribution of economic resources, and the loss of a sense of community.

By drawing upon the best from the past and the present, we can plan communities that will more successfully serve the needs of those who live and work within them. Such planning should adhere to certain fundamental principles.

Community Principles

1 All planning should be in the form of complete and integrated communities containing housing, shops, work places, schools, parks and civic facilities essential to the daily life of the residents.

2 Community size should be designed so that housing, jobs, daily needs and other activities are within easy walking distance of each other.

3 As many activities as possible should be located within easy walking distance of transit stops.

4 A community should contain a diversity of housing types to enable citizens from a wide range of economic levels and age groups to live within its boundaries.

5 Businesses within the community should provide a range of job types for the community's residents.

6 The location and character of the community should be consistent with a larger transit network.

7 The community should have a center focus that combines commercial, civic, cultural and recreational uses.

Regional Principles

1 The regional land use planning structure should be integrated within a larger transportation network built around transit rather than freeways.

2 Regions should be bounded by and provide a continuous system of greenbelt/wildlife corridors to be determined by natural conditions.

3 Regional institutions and services (government, stadiums, museums, etc.) should be located in the urban core.

4 Materials and methods of construction should be specific to the region, exhibiting continuity of history and culture and compatibility with the climate to encourage the development of local character and community identity.

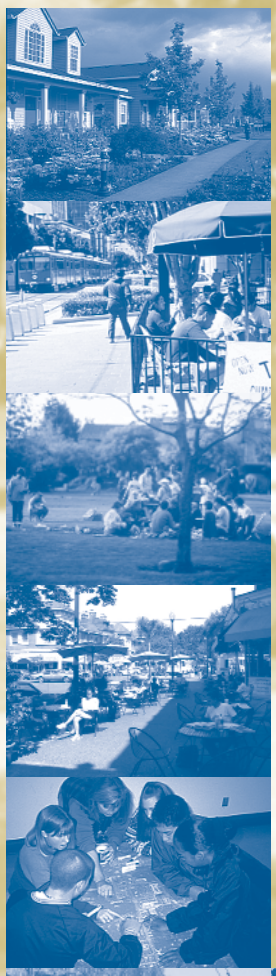
for Resource-Efficient Communities

8 The community should contain an ample supply of specialized open space in the form of squares, greens and parks whose frequent use is encouraged through placement and design.

9 Public spaces should be designed to encourage the attention and presence of people at all hours of the day and night.

10 Each community or cluster of communities should have a well defined edge, such as agricultural greenbelts or wildlife corridors, permanently protected from development.

11 Streets, pedestrian paths and bike paths should contribute to a system of fully connected and interesting routes to all destinations. Their design should encourage pedestrian and bicycle use by being small and spatially defined by buildings, trees and lighting; and by discouraging high-speed traffic.



12 Wherever possible, the natural terrain, drainage, and vegetation of the community should be preserved with superior examples contained within parks or greenbelts.

13 The community design should help conserve resources and minimize waste.

14 Communities should provide for the efficient use of water through the use of natural drainage, drought tolerant landscaping and recycling.

15 The street orientation, the placement of buildings and the use of shading should contribute to the energy efficiency of the community.

Implementation Strategy

1 The general plan should be updated to incorporate the above principles.

2 Rather than allowing developer-initiated, piecemeal development, local governments should take charge of the planning process. General plans should designate where new growth, infill or redevelopment will be allowed to occur.

3 Prior to any development, a specific plan should be prepared based on the planning principles. With the adoption of specific plans, complying projects could proceed with minimal delay.

4 Plans should be developed through an open process and participants in the process should be provided visual models of all planning proposals.

The Ahwahnee Principles for Economic Development

As the smart-growth approaches to development began taking root in the early 1990s, it became clear that a companion set of principles addressing the economic development aspects of creating more livable communities was also needed. The Ahwahnee Principles for Economic Development were adopted in 1997, a half-dozen years following the establishment of the precepts for resource-efficient land use.

Prosperity in the 21st century will be based on creating and maintaining a sustainable standard of living and a high quality of life for all. To meet this challenge, a new comprehensive model is emerging which embraces economic, social and environmental responsibility and recognizes the economic value of natural and human capital.

■ **www.lgc.org/ahwahnee/econ_principles.html**

The Ahwahnee Water Principles

Water – how we capture it, treat it, use it, control it, manage it and release it – is vital to the 36 million people who live in California and has a tremendous impact on our quality of life, local budgets and day-to-day policy-making. And as California adds another 12 million residents by 2030, water-resource challenges will be increasingly serious.

Unless we locate new growth in the right places and develop it properly, the streams, rivers and lakes that receive runoff water will become increasingly more polluted and the natural functions of watersheds that collect and cleanse our water supplies will diminish.

Adopted in 2005, the 14 Ahwahnee Water Principles – identified by water experts at the federal, state and local levels as the most effective and politically and economically viable least-cost options to help guide communities concerned about their future water supplies – can be grouped into four different categories:

1. Growing in a water-wise manner.
2. Water-friendly neighborhood/site-scale planning and design strategies.
3. Water conservation approaches to make the most efficient use of our existing water supplies.
4. A set of corollary guidelines that can help put these nine community principles into action through strategies for implementing practical steps to make the physical changes necessary to ensure water sustainability.

The California State Water Resources Control Board now promotes the principles and is using them as a way of prioritizing grants and loans to local government. The number of cities and counties adopting these principles as policy is growing every day.

■ **www.lgc.org/ahwahnee/h2o_principles.html**

editing+design: Dave Davis • Local Government Commission's Center for Livable Communities • 916 / 448-1198 • www.lgc.org

GUIDE TO

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William Fulton

SECOND EDITION – EXPANDED AND UPDATED

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Chapter 6

The Basic Tools

Part 1—The General Plan

Although planning—that is, guiding the physical development of California's communities—is a task undertaken by myriad government agencies, private companies, and individuals, the core of this task is the planning work done by the state's 478 cities and 58 counties. And for local governments, the day-to-day planning work is achieved mostly through the use of three well-established tools: the "general plan," a comprehensive policy document, and two sets of implementing regulations, the zoning ordinance (often called the development code) and the "subdivision regulations."

Although planning involves many other documents, regulations, and implementation mechanisms, these three tools do most of the work, and no one can truly understand California's planning system without understanding what they are and how they operate. Together they create the policy foundation for local planning and the administrative regulations that carry out that policy.

The general plan is California's version of the master or comprehensive plan.

The "general plan" (required by Govt. Code § 65300 *et seq.*) is California's version of the "master" or "comprehensive" plan. It lays out the future of the city's development in general terms through a series of policy statements (in text and map form).

The zoning ordinance is designed to translate the general plan's broad policy statements into specific requirements of individual landowners.

The "zoning ordinance" (authorized by Govt. Code § 65850 *et seq.*) is, at least theoretically, the beast of burden for the general plan, designed to translate the general plan's broad policy statements into specific requirements of individual landowners. The zoning ordinance divides all land in the city into zones and specifies the permitted uses and required standards in each zone.

The Subdivision Map Act (Govt. Code § 66410 *et seq.*) is a state law that establishes the procedures local governments must use

The Subdivision Map Act establishes procedures local governments must use when considering subdivision of land.

when considering the subdivision of land. The Map Act is intended to ensure, among other things, that adequate public services will be provided to these new subdivisions.

Some overlap exists among the three tools. Generally speaking, however, they are meant to be used together to ensure the orderly development of communities in California. This chapter will focus on the general plan, while the next two chapters will discuss zoning ordinances and subdivision regulations respectively. Later chapters will discuss other tools used to shape and implement planning policy in California.

General Plans

Since the early 20th century, the idea of a comprehensive or master plan guiding a city's future has been an elusive ideal for both planners and local policy makers. Comprehensive plans have gone through many faddish changes during that time. Some have been little more than town-sized "site plans." Others have been policy plans, offering a set of policies to guide future decisionmaking without providing a vision of a community's physical future. And from time to time planners have grappled with the seemingly unanswerable question of whether a comprehensive plan should be a static and hard-to-change document, similar to a constitution, or a living document that can be constantly updated to respond to rapidly changing conditions.

Through all these evolutions, however, one fact has remained constant: Living or static, the comprehensive plan is supposed to be the supreme document guiding the future physical development of a community—the set of policies from which all decisions flow. This has not always been the case in California planning, of course, but over the last 30 years it has become a reality.

The idea of a comprehensive or master plan dates back to 1927, when the California legislature first gave local governments express authorization to form planning commissions.

The idea of a comprehensive or master plan in California dates back to 1927, when the legislature first gave express authorization to local governments to form planning commissions and called upon those planning commissions "to make and adopt a master plan for the physical development of the municipality, or county, and of any land outside its boundaries which, in the commission's judgment, bears relation to the planning thereof." Two years later, adopting the principles contained in the Standard City Planning Enabling Act, the legislature made a master plan mandatory for those cities and counties that created a planning commission.

In succeeding decades, the master plan requirements evolved gradually toward the general plan process we know today. In

1937, the state began requiring all cities and counties to adopt master plans, making California one of the first states in the nation to impose this requirement. Beginning in the 1950s, the state began requiring localities to prepare specific "elements," or sections, of the master plans, with land use and circulation—still the core of most general plans—becoming mandatory first.

In 1937, the state began requiring all cities and counties to adopt master plans.

Finally, in 1965, the state's planning laws were reorganized. The master plan was renamed the "general plan," and localities were authorized to draw up "specific plans" to implement the general plan in specific geographical areas. This general plan may have been intended as the primary document for planning a community's future, but there was no requirement that it be enforceable. As prominent land use lawyer Daniel J. Curtin, Jr., points out in his book *Curtin's California Land Use and Planning Law,* up until 1971 state law even permitted local governments to adopt a zoning ordinance before they adopted a general plan.

In 1965, the master plan was renamed the "general plan," and localities were authorized to draw up "specific plans" to implement the general plan in specific geographical areas.

In 1971, however, the state legislature passed a law requiring counties and most cities to bring their zoning ordinances and subdivision procedures into conformance with their general plans. Ironically, this law was originally drafted with the narrow purpose of controlling second-home subdivisions. Nevertheless, the "consistency law," as it is usually known, became one of the most important planning laws in California history, because it essentially reversed the legal hierarchy of the general plan and the zoning ordinance.

In 1971, the state legislature passed the "consistency law" which essentially reversed the legal hierarchy of the general plan and the zoning ordinance.

In the past, the zoning ordinance usually had the most teeth, but today its legal function is to serve as a tool by which the general plan can be implemented. As one appellate court wrote, the consistency law "transformed the general plan from just an 'interesting study' to the basic land use charter governing the direction of future land use in the local jurisdiction." (The consistency legislation applies only to counties and general law cities. But a later state law specifically required Los Angeles's zoning to be consistent with its general plan, and some legal opinions suggest that other charter cities are subject to the provisions as well. In addition, according to the state Office of Planning and Research, at least 60 of the state's 108 charter cities have local ordinances requiring consistency.) Perhaps the best way to understand the role of the general plan is to think of it, as many court rulings have done, as the "constitution" for the future development of a community. Like the constitution, the general plan is the supreme document from which all local land use decisions must derive.

Like the constitution, the general plan is the supreme document from which all local land use decisions must derive, but usually it does not contain specific implementation procedures.

Like a constitution, it is truly general. The general plan contains a set of broad policy statements about the goals for future development of the city. But usually it does not contain specific implementation procedures. That's why the zoning ordinance and other implementation tools are needed. (Occasionally the general plan and zoning ordinance are combined into one document, but typically the zoning ordinance is written after the general plan has been adopted.)

And like a constitution, the process of drawing up and revising a general plan creates an important forum for debate about the future of a community. Although the state does not establish a specific timetable for updating general plans, a wholesale revision typically occurs about once every 10 to 15 years—usually when the data on which the plan is based become dated, when the growth patterns facing a community have changed, or when the plan is perceived as legally vulnerable. The process of drawing up and adopting these revisions often becomes, essentially, a "constitutional convention," at which many different citizens and interest groups debate the community's future.

There is, however, one important difference between a constitution and a general plan. Unlike a constitution, a general plan is not particularly hard to change—a fact which often undermines its political credibility. General plan amendments, which are usually designed to accommodate a particular development project or tweak the plan in some specific way, are permitted four times per year under state law. But even this restriction does not reflect the plan's true fluidity. Because any number of individual changes may be grouped into a formal amendment each quarter, the plan can essentially change at any time as long as a majority of the city council or board of supervisors deems the action appropriate.

General plan amendments are permitted four times per year under state law. But even this restriction does not reflect the plan's true fluidity.

Thus, the general plan in California—though it has more teeth than it once had—often reflects the basic tension between the static and the dynamic that has characterized master planning efforts for the past century. On the one hand, the general plan is supposed to be a stable document providing a consistent vision for the future of a community. On the other hand, it can be easily changed for short-term political gain. By its very nature, the general plan is a document that is at once imposing and malleable.

What the General Plan Contains

General plans come in all shapes and sizes. Some are slick and colorful; others consist of little more than some typewritten text

and a couple of rudimentary diagrams.[1] But all general plans share certain characteristics.

A general plan is supposed to contain a vision of the community's future.

Most important, a general plan is supposed to contain a vision of the community's future. At its best, the general plan identifies hopes and aspirations, and translates them into a set of policies laying out the community's physical development. Considering how few restraints the state imposes on general plan content, it is remarkable how rarely a general plan actually contains a thoughtful vision of its community's future.

Most will contain a preamble that includes a set of inspirational comments. But the policies that generate widespread public debate usually revolve around some quantitative measurement of the future: the eventual population, the number of housing units to be added, the amount of commercial square footage that will be permitted. Indeed, as will be discussed in more detail later, this is one of the great weaknesses of community debate about general plans—that they tend to focus on specific numbers, rather than a broader discussion of a community's future. In most general plans, remarkably little attention is given to design, quality of life, and the likely patterns of day-to-day living that will emerge as a result of the plan's policies.

General Plan

- (Preamble)
- (Technical Background Report)
- Land use element
- Circulation element
- Housing element
- Conservation element
- Open-space element
- Noise element
- Safety element
- (Optional additional elements)

Many general plans will also encompass "area plans," which are more specific versions of the general plan dealing with smaller geographical areas. Sometimes known as a community plan, an area plan has the same force of law as a general plan. (It is different, however, from a specific plan, which will be discussed in chapter 12.)

Most general plans will also include a technical background report, consisting of quantitative information about the city's demography, housing stock, economic make-up, and other aspects of the community. This information will be used as documentation to support the policy direction laid out in the general plan. Also important in shaping policy direction for the general plan are the circulation element and the soils, slopes, and seismic subsections of the safety element that are, or should be, the primary determinants of any

1. One important breakthrough in the distribution of county general plans, at least, has been achieved by the California Resources Agency. Working with UC Berkeley, the agency has electronically scanned all county general plans and has made them available on the Internet through California's Land Use Planning Information Network, or LUPIN. The general plans are available on the world wide web at: http://ceres.ca.gov/planning.

LUPIN = Land Use Planning Information Network

limitations on the use of land and on the pattern, location, and character of development. These are the constraints that, if properly identified and mapped, form the reality check around which land use preferences are expressed in the land use element.

The fact that the general plan is the constitution—the supreme local land use document—does not mean it is exempt from state laws.

The general plan also must follow certain state requirements contained in the state Planning and Zoning Law. The fact that the general plan is the constitution—the supreme local land use document—does not mean it is exempt from state laws.

In fact, complying with the California Environmental Quality Act often is an expensive and time-consuming part of a general plan update. Most cities and counties report spending one-fifth to one-third of their general plan budgets on an EIR for the plan.

As one might expect given the state's general approach to land use policy, California's general plan requirements do not require that local governments accept specific policy conclusions. Nor is a city's layout, mix of uses, height limitations, character, economic development, or any number of other matters the concern of the state. Rather, local governments are required to follow certain procedures and cover certain subject areas (called "elements") in the general plan. Similarly, the state does not, generally speaking, review general plans for compliance with state law; such compliance is ensured only through litigation. (The housing element is something of an exception to both of these statements, and will be dealt with in a separate section later in this chapter.)

The state does not review general plans for compliance with state law; compliance is ensured only through litigation.

Under state law, every local general plan must include seven elements, or sections. These include:

- **The land use element,** the most basic part of the plan, which deals with such matters as population density, building intensity, and the distribution of land uses within a city or county.
- **The circulation element,** which must deal with all major transportation improvements. It serves as an infrastructure plan and also must be specifically "correlated" with the land use element—that is, the infrastructure must address the development patterns expected by the land use element.
- **The housing element,** which must assess the need for housing for all income groups and lay out a program to meet those needs.
- **The conservation element,** which deals with flood control, water and air pollution, and the need to conserve natural resources such as agricultural land and endangered species.
- **The open-space element,** which is supposed to provide a plan for the long-term conservation of open space in the community.

- **The noise element,** which must identify noise problems in the community and suggest measures for noise abatement.
- **The safety element,** which must identify seismic, geologic, flood, and wildfire hazards, and establish policies to protect the community.

These seven elements are not etched in stone. The legislature may amend the general plan law to add or subtract required elements whenever it wants. From 1970 to 1984, for example, the state required separate elements to deal with scenic highways and seismic safety, but then folded those requirements into other elements. The legislature has not increased the number of required elements since the 1980s. Instead, lawmakers have mandated that the elements address certain issues. For example, a law adopted in 2002 requires a city or county with a military base to address in the land use element the impacts of urban development on military operations. The law also requires the circulation element to include existing and proposed military airports and seaports.

Individual communities may add any other elements they wish—and most communities do. The specific mix of elements will vary depending on the needs of each community, but many patterns are evident. According to the Office of Planning and Research, parks and recreation, public facilities, and economic/commerce are the most popular optional elements. In Southern California, where smog is a major issue, air quality elements are common, partly because the South Coast Air Quality Management District has provided funding for local governments to prepare the elements. Agriculture elements are popular in rural areas. About 20 counties have adopted agriculture elements, but so have some unlikely cities, such as Rancho Palos Verdes (an extremely wealthy residential community near Long Beach) and San Jose (one of the most densely populated big cities in America). Virtually any area of community concern may be addressed in a separate element, but once an element is included in the general plan, it carries the same force of law as the seven elements required by the state.

It is also permissible to combine elements, and many communities do so. A particularly popular technique is a combined land use and circulation element, because the distribution of land uses and the construction of roads and transit lines are closely related, and because state law requires that they be specifically correlated. As will be discussed later in the chapter, even if they are not combined, these two elements are often developed in tandem.

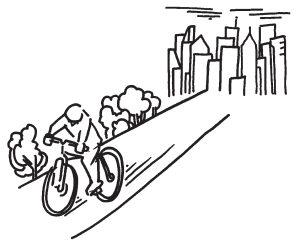
The Most Popular Optional General Plan Elements

HERE IS A LIST OF the most frequently used "optional" elements of the general plan by cities and counties in California:

- Parks and Recreation (194)
- Economic (123)
- Public Facilities (114)
- Design (113)
- Air Quality (101)
- Seismic (94)
- Scenic Highways (89)
- Growth Management (85)
- Historic Preservation (82)
- Transportation (67)

Source: 2003 Planners Book of Lists, Governor's Office of Planning and Research, Sacramento

Not only must the zoning ordinance and other planning documents be consistent with the general plan, the general plan's provisions must be internally consistent as well.



Perhaps the most important legal principle is that the elements of the general plan must be consistent. Not only must the zoning ordinance and other planning documents be consistent with the general plan, the general plan's provisions must be internally consistent as well. (Under law they are all regarded as equally important.)

The reasons for this requirement are obvious. A city council intent on pleasing all interest groups could be tempted to pass conflicting policies. For example, the city may enact an open-space plan saying that 80 percent of the city's land must be set aside for open space, and at the same time approve a housing element saying that 80 percent of the city's land must be set aside for housing. The internal consistency requirement is meant to assure that the general plan is not only visionary, but also realistic.

It is probably impossible, however, to draw up a general plan that is totally free from internal inconsistencies, meaning that most general plans are, at least theoretically, vulnerable to legal attack. Indeed, the consistency requirements—both zoning consistency and internal consistency—have been a favorite tool for builders trying to strike down growth-control initiatives.

Each element of the general plan has its own story, and a separate chapter could be written for each one. In order to describe the general plan, however, this chapter will primarily focus on the land use element, which often serves as the bedrock of the general plan. The housing element will be discussed in chapter 16.

The Land Use Element

Although the general plan deals with many aspects of a community and its future, perhaps its most basic job is to chart a course for the community's physical development. And for this reason the land use element is the broadest ranging, the most important, and usually the most highly publicized aspect of the general plan.

The land use element must lay out a vision of all the buildings, roads, and public facilities in the city—not only where they are now, but where they will be in the future.

At its core, the land use element must lay out a vision of all the buildings, roads, and public facilities in the city—not only where they are now, but where they will be in the future. Perhaps the most important piece of the land use element is the diagram accompanying the text. This diagram graphically represents the policies laid out in the land use element, and must be consistent with the written text.

Because it looks like a map, the land use diagram often becomes the focal point of discussion. Residents can relate much more directly to the diagram than to the written text. They can identify the part of town where they live and see what the land use element calls

for in that area. In many ways, this is good, because it sparks discussion and involves the residents in the process of preparing the land use element. In some ways, however, it is not so good. The diagram and its vivid graphic elements—bright colors, geometric shapes, and so forth—might encourage residents to think that the map's potential will be fully realized, especially if the diagram includes something they don't like.

Unlike a zoning map, the land use diagram does not have to show the impact of the city's regulations on every single parcel of land.

For this reason, it is important to note that the land use diagram is not necessarily a map, nor is it required to be by law. Unlike a zoning map, it does not have to show the impact of the city's regulations on every single parcel of land. Rather, it is merely a graphic representation of a series of policy statements. The diagram does not say, "We are going to put this building on this parcel." Instead, it says, "Generally speaking, in this part of town we're going to permit and encourage these kinds of developments." The diagram doesn't even have to look like a map; it could be a schematic diagram or even something more abstract, as long as it gets the message across to the citizens.

In planning jargon, the land use element is supposed to be concerned primarily with three characteristics of the buildings, facilities, and arrangements of land uses in a given community. These are:

- **Location.** Where different land uses—residential, business, retail, industry, open space—will be located in the community.
- **Distribution.** The geographical pattern, showing how those different land uses are arranged in the community.
- **Density and intensity.** How large the buildings will be and how tightly packed on the landscape.

The general plan law and its accompanying guidelines organize general plan requirements in these areas in a slightly different way. Under the law, the land use element must contain the following information about the use of land in the community:

- **Distribution and location.** State law requires the land use element to discuss the general distribution of some land uses and the specific location of others.

The land use element must address the distribution of:

- **Housing, business, and industry**
- **Open space and agricultural land**
- **Mineral resources**
- **Recreational facilities**

As with the land use diagram, these discussions do not have to identify the specific parcels where these uses are or will be located. Rather, they must reveal general patterns in the community.

However, the land use element must discuss the specific location of certain land uses—mostly those that require the intimate involvement of public agencies. These include:

- **Educational facilities**
- **Public buildings and grounds**
- **Future solid and liquid waste facilities**

When applicable, the land use element must also identify flood plains and areas designated for timber production.

The basic role of the land use element is to lay out the general patterns of development in the community.

The reasons for these requirements should be clear. The basic role of the land use element is to lay out the general patterns of development in the community. If they have to identify the probable future location of public facilities, as well as the current location of flood plains and timber lines, local governments are much more likely to consider whether the broad land use patterns they are establishing bear a relationship to their own public works projects, and to natural barriers to development.

- **Standards for density and intensity.** The land use element must also lay out standards for population density (how many people per square mile or a similar measurement) and building intensity (how much building space will permitted in relation to the land area involved).

A city does not regulate the actual number of people moving in or out of it. The population density projections are translated into dwelling units per acre.

Many communities deal with population density by including a projected "ultimate" population for the city or county, and perhaps even for subareas as well. A city does not regulate the actual number of people moving in or out of it. Rather, the population density projections are translated into dwelling units per acre.

Each neighborhood is assigned a "standard" in terms of dwelling units per acre (between four and eight, say, in a single-family neighborhood; 35, 50, or even more in a multi-family neighborhood). Then the locality will make some assumptions about household size—that is, how many people will live, on average, in each household. (Average household size typically runs between two and three persons, though it has been rising in some urban areas because of demographic changes.) Collectively, these standards will be used to create both the density and distribution of population called for in the land use element's broad policy statements.

Standards for building intensity are required to avoid the problem of using vague terms in drawing up land use policies. The land use diagram may call for "regional commercial" development along a local freeway, "service and neighborhood commercial" projects adjacent to residential neighborhoods, and "very low-density residential"

development on the edge of town. But these general terms must be defined more specifically somewhere in the general plan. For example, while the diagram may earmark an area for very low-density development, a section of the land use element dealing with standards may define "very low density" to mean specifically one unit for every two acres of land.

Interaction With Other Elements

The land use element, of course, must be consistent with all other elements of the general plan, as well as with the general plan's other provisions. Nevertheless, two specific relationships are worth noting.

The circulation element must call for the creation of a transportation system that can handle the traffic created by the community envisioned in the land use element.

The land use element must bear a close correlation to the circulation element. Simply put, the circulation element must call for the creation of a transportation system that can handle the traffic created by the community envisioned in the land use element. Though the land use element must be consistent with other elements, the correlation with the circulation element is regarded as particularly important. It would be counterproductive to earmark an area for future development without also identifying the transportation facilities that would be required to accommodate that growth.

In practice, the land use and circulation elements will be crafted together in an iterative process. Typically, planners will draft a land use element with densities and intensities for the entire community—where jobs, housing, and shopping are likely to be located and in what quantities. Then the traffic engineers will incorporate the draft information into their statistical analysis, translating the land use patterns into a prediction of future traffic patterns.

Through this process, the traffic engineers will identify potential problem areas—road segments, intersections, etc.—which the planners will then use to redraft the policies in the land use element. Generally speaking, the combined land use and circulation analysis will provide decisionmakers with a well-defined set of policy choices. They may have to choose among the following types of policy options:

- **Expand road capacity** in areas where new development is expanded
- **Move new development** to areas which already have excess road capacity
- **Adopt policies to reduce** vehicle trips or encourage car drivers to use other modes of transportation
- **Reduce the total** amount of development permitted

There may be many other options, but these examples illustrate how the land use and circulation elements are developed together to create a coherent strategy for the future development of the community.

The noise element must be used in the land use element to determine what the land use patterns will be.

The land use element must also maintain a close relationship to the noise element. This requirement means that the noise contours and standards developed in the noise element must be used in the land use element to determine what the land use patterns will be. For example, if a vacant district lies next to a freeway, the land use element must recognize that freeway noise will have an impact on the adjacent land. Thus, the land use element might call for industrial buildings or warehouses on the vacant property, or else require that sound barriers be constructed if it is to be part of a residential district. The technical analysis conducted in the noise element will be discussed in more detail later in the chapter.

While the land use element must meet certain general requirements, the specifics are up to each individual community. For example, although requiring that a land use element identify the location of future schools and public buildings, state planning law imposes few standards. The law says that new schools must be at least 500 feet away from freeways, but the law does not say that the schools must be located near the houses where the students will live.

Neither does the law require a city or county to accept the recommendations of the local school district, which is free to ignore the general plan anyway.

This approach is different from that of several other states, notably Oregon and Florida, which review local plans and require strict conformance to state goals and standards. Nevertheless, it is in keeping with California's general attitude toward local planning, which is to set up the process and then stay out of it.

Crafting the General Plan

The legally prescribed process of creating and adopting a general plan is relatively simple. State law imposes only a few procedural requirements—notably one public hearing before the planning commission and one before the city council. But, as is clear from the Office of Planning and Research's General Plan Guidelines, writing a general plan can be a terribly involved process. If the general plan is the constitution for the future development of a community, then the process of writing or revising the general plan is really the "constitutional convention." For most cities and counties, it is a long, expensive, messy, often frustrating, often exciting process.

A wholesale general plan revision is likely to take at least three years and, even for small cities, will cost at least half a million dollars. Technical analysis on specific aspects of the general plan (a process that can dovetail with the environmental impact report) and public meetings and workshops typically consume much of the general plan budget. If a community does not have a consensus about growth, then there is almost no limit to how much the general plan revision can cost in money and time. In 1995, El Dorado County finally adopted a revised general plan after almost seven years of debate and multiple political swings on the board of supervisors. Environmental organizations sued, and four years later, a Superior Court judge threw out the revised plan because the EIR was inadequate. In 2004—15 years and four planning directors after the general plan process began—El Dorado County adopted a new general plan. The plan then barely survived a voter referendum, and the county still had to convince a judge to accept it.

Adopting a general plan is, of course, regarded as a "legislative" act by local government, and in cities with well-organized citizen groups, the general plan process closely resembles the legislative wrangling that goes on in Washington and Sacramento. Elected officials are heavily lobbied on particular issues. Interest groups decide which issues they can compromise on and which they must go to the mat for. In the end, a general plan, like a law or a constitutional amendment, will succeed only if all the important political constituencies are satisfied.

Riverside County Integrated Plan

STATE LAW REQUIRES THAT A general plan be "comprehensive" and "long term." The state Supreme Court has called the general plan the "constitution for future development." So when a county prepares a general plan, transportation plan, and species habitat plan at the same time, it might appear to be the normal practice. Instead, it's the exception.

In 1999, Riverside County began work on the Riverside County Integrated Plan (RCIP), which involved crafting a new general plan for the entire county, and preparing a transportation plan and a multi-species habitat conservation plan for the western part of the county. Oftentimes, cities and counties adopt a general plan first, and then they work with whichever entity is responsible for the transportation plan to ensure that growth outlined in the general plan is accommodated. Whatever territory is left over after those two plans are adopted becomes, by default, open spaces for flora and fauna. Riverside County tried a more comprehensive approach.

Groundwork began in 1996, when county officials saw projections that called for continued rapid growth and worsening congestion on already clogged freeways. Demographers said the western county's population would nearly double to about 2 million people by 2020, so officials talked about preparing a new transportation plan. But they soon recognized that requirements for protecting endangered species could block proposals in a new transportation plan. Thus, preparing a transportation plan and a plan that set aside habitat for rare plants and animals seemed like the way to go. At the same time, the county's 1981 general plan, which had been amended piecemeal hundreds of times, was in need of an overhaul. The RCIP was born.

Initially, county officials set aside $30 million and three years for the RCIP. Those were not enough. After four years, about $35 million, and a name change to the Riverside County Integrated *Project* (to make the effort sound more action-oriented), the county had adopted the general plan and habitat plan. But adoption of the transportation blueprint by the Riverside County Transportation Commission was still a ways off.

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Riverside County used a "stakeholder-driven" process, in which representatives of various interest groups, such as developers, landowners, and environmentalists, served on a number of committees that steered the planning effort. There were hundreds of publicly noticed advisory committee meetings with scores of stakeholders joining an army of county planners and consultants. All of the planning was aimed at accommodating growth—not slowing growth or trying to direct it elsewhere. The end result was a general plan that was clearly favorable to homebuilders. Yet the habitat plan designated about 500,000 acres—350,000 acres of publicly owned land and 150,000 acres of private property—for preservation, meaning that nearly one-quarter of western Riverside County would remain off-limits to development. The transportation plan intended to designate broad corridors where the government could build freeways, and possibly rail lines and separate lanes for trucks or busses. The transportation plan also sought to create one new connection each to neighboring Orange and San Bernardino counties.

Many of western Riverside County's 14 cities felt left out of the process. The alienation deepened when county officials told the cities to collect development impact fees to fund transportation projects and habitat land purchases, and to set aside land within their cities as habitat. The penalty for not going along with the county's approach was the loss of future transportation improvements. The cities reluctantly fell into line.

At more than $35 million, the RCIP is likely to be the most expensive local planning effort in the country's history. The cost and scope are similar to state plans adopted in places like New Jersey. Whether the final plans are effective or not will depend largely on implementation. The transportation projects and habitat land purchases are expected to cost more than $10 billion, and no one is certain about the sources of all of that money. Recalcitrant cities are likely to continue quarreling with the county. And environmentalists who are unsatisfied that the plan does not stem urban sprawl adequately have vowed to take their cause to the courtroom.

Planners all over California closely watched Riverside County's experience with comprehensive planning. Thus far, no other county has been willing to try the approach for itself. ■

The Process: Participation and Politics

A proposed general plan (or general plan revision) usually doesn't leap forward into public hearings fully formed. In most cities, the process begins with two steps: the creation of an advisory task force, often known as the "general plan advisory committee," and the selection of an outside general plan consultant. About half of all cities do their general plans in house. Some cities precede creation of the task force with a "visioning" process, in which the city and community leaders gather public input and attempt to reach a consensus about what sorts of things they want for the city, such as better parks or preservation of an historic district. Sometimes the advisory task force undertakes the visioning process.

A citizen's advisory committee is usually made up of 20 to 30 citizens who represent various neighborhoods, industries, and other interest groups in the city. Membership will vary from city to city, depending on the political climate. In many cities, the real estate industry will be strongly represented. In slow-growth cities, on the other hand, it may be politically difficult to include more than a few representatives from the real estate industry, and the emphasis is likely to be on broad representation from neighborhood and homeowner groups. Architects, planners, engineers, representatives of other government agencies, and other people familiar with the land use process may also participate on the advisory committee.

Over a period of months or even a few years, the consultant or lead staff

person and the citizens committee will put together a draft of the general plan. In most instances, the consulting team will provide the committee with technical background and make recommendations, while the committee will make the initial policy choices. After receiving advisory committee approval, the general plan will then move on to the planning commission and the city council. Either or both of these bodies may alter the basic document or even change it completely. Again, this adoption process can last for many months. (As a major policy statement affecting the environment, the general plan also requires that an environmental impact report be prepared before approval. EIRs will be discussed in more detail in chapter 9.)

The rise of citizen power has changed this process considerably in recent years, making it longer, more expensive, in some ways more cumbersome, in others more democratic.

The rise of citizen power has changed the general plan process considerably, making it longer, more expensive, in some ways more cumbersome, in others more democratic. In many cities, city managers and council members resist broad public participation. They believe that an elite group of decisionmakers will make the most-informed choices and prevent the process from getting bogged down. These city managers and council members say visioning and consensus-building is unrealistic. Leaders in many other cities recognize that organized citizen groups cannot be ignored and welcome their participation.

The 2003 version of the General Plan Guidelines for the first time included a public participation chapter. Partly as a method of avoiding future conflicts, the guidelines strongly recommend early, frequent, and broad public participation in workshops, town hall meetings, focus groups, design "charrettes," and other activities.

Typically, an active citizenry is a response to a series of development disputes within a community, when ordinary people feel that their neighborhoods are threatened and organize to protect themselves. Once politicized, these people rarely return to the role of passive citizens. If the members have interest and dedication, the group becomes a permanent part of the city's decision-making infrastructure, monitoring and commenting on the general plan as it proceeds from the advisory committee to the city council. And members of neighborhood groups and citizens committees often graduate to planning commissions and political office on the strength of their newfound exposure.

Generally speaking, it is easier for a smaller city to become highly political about planning issues, and affluent citizens are more likely than poor citizens to become active participants in the debate. This is not always true, of course. San Francisco is one of

the state's largest cities and the level of citizen participation is remarkably high. And citizen groups in poor neighborhoods sometimes carry considerable political weight. Nevertheless, political organization is more likely to occur in a smaller community with an affluent and educated populace.

Even in a highly organized city, a political consensus among organized groups does not guarantee the smooth passage and implementation of the general plan.

Even in a highly organized city, however, a political consensus among organized groups does not guarantee the smooth passage and implementation of the general plan. Most citizens are mobilized only by an immediate threat, such as the appearance of a bulldozer on a nearby piece of land. A general plan, by contrast, is an abstract process laying out a broad brush vision of a community's future. Average citizens won't care much about the general plan unless they understand how the process works and how the general plan's provisions will affect the likelihood of a bulldozer turning up in their neighborhood in the near future. Even if a city solicits participation, many citizens simply won't pay attention until a specific development proposal arises, long after the general plan is done. By contrast, developers usually understand how the general plan affects their interests, and are often major participants in both the crafting and hearing processes.

Technical Analysis

As the general plan has grown in importance, so has the role of technical analysis and the consultants who may perform these tasks.

The policies contained in a general plan are supposed to be based not only on a vision of a community's future, but also on data and analysis.

The policies contained in a general plan are supposed to be based not only on a vision of a community's future, but also on data and analysis. That is why the starting point for most general plans is a technical background report—reconnaissance of existing data on myriad aspects of life in the community, including building density and condition, traffic patterns, demographic and population data, information about water and wildlife, discussion of hazards, the community's fiscal condition, assessment of community needs for parks and open space, and so on. As the general plan is drafted, additional technical analysis will be required to test traffic, land use, and air quality scenarios, to examine the fiscal impact of future change, to assess noise problems, and to measure change in many other ways. (Most wholesale general plan revisions are accompanied by an environmental impact report, and much of the technical information will overlap, eliminating the need to collect it twice.)

The most important point to note, however, is that as the general plan has been strengthened as a policy document, both communities and the courts have come to demand a higher standard of

technical analysis. In part, this is required to bulletproof a general plan against litigation, which will be discussed later in more detail. At the same time, the analysis provides a foundation of information on which the policy choices contained in the general plan can be built.

A good example of the growing role of technical analysis is the noise element. As noted earlier, the general plan law calls for linkage between the land use element, which identifies the distribution of potentially noisy activities, and the noise element, which is supposed to analyze and mitigate noise levels in a community.

Noise analysis, however, is not a casual affair. Under state law, state guidelines, and case law, noise analysis must be done in a particular manner.

State law (Govt. Code § 65302(f)) requires noise elements to identify and analyze noise problems associated with a broad range of specific activities, including major roads and freeways, railroads, aviation facilities, and industrial plants. The law also requires localities to follow the "Noise Element Guidelines" prepared by the state Department of Health Services (appendix C of the *General Plan Guidelines*).

These guidelines call for a very specific noise analysis process, including identification of noisy activities, the likely impact of future land use patterns on noise, and a strategy to mitigate noise problems. In effect, the state law and the Noise Element Guidelines mandate that local governments use noise contour analysis, especially in conjunction with the land use element. (Noise contours are similar to topographical contours. Noise specialists measure decibel levels in many locations, or predict them, and then map the resulting contours at which those levels occur.)

Local governments who don't undertake technical analysis on issues such as noise are faced with serious consequences, whether the problems being analyzed are large or small. In 1978, two years after the noise element legislation was passed, Mendocino County's general plan was challenged on the grounds that its noise element contained no technical background information about the impact of noise on land within the county.

Mendocino County's response was simply that a detailed technical analysis was not necessary for "a quiet rural county such as Mendocino." Mendocino County may be a quiet place even to a casual observer, but this fact did not let the county off the hook. The court of appeal found the noise element inadequate, saying that the technical requirements in state law were mandatory, not optional, even if local decisionmakers didn't think they had a noise

problem. *Camp v. Board of Supervisors,* 123 Cal. App. 3d 334 (1981). As a result of this ruling, the entire general plan was declared legally inadequate and the county was enjoined from issuing development permits until the problems were rectified.

Court Challenges

Had it not revised its noise element, Mendocino County would have been prohibited from issuing any building permits—just as Yuba County at one time was prohibited from approving a large specific plan until it revised its housing element to conform with state law. Because there is no state mandated schedule for revising general plans, communities often undertake needed revisions as a response to, or in order to avoid, litigation.

With a few minor exceptions, no state agencies hold the power to review local general plans and penalize cities and counties if their general plans are inadequate.

As with so much of California planning law, state laws regarding general plans are enforced only by litigation. With the minor exceptions noted above, no state agencies hold the power to review local general plans and penalize cities and counties if their general plans are inadequate. Only a court can do so. For this reason, citizen groups and others with an interest in land use regulations, such as the building industry, hold considerable power over general plans because of their ability to sue. This is why cities and counties have come to fear general plan lawsuits, whether they come from builders, slow-growthers, or affordable housing activists.

A court that finds a local general plan invalid can strip the locality of all of its land use power.

Thus, the planning process depends heavily on citizen enforcement to hold local governments accountable. Typically, if citizen groups or building industry leaders dislike the results of the general plan process (or a general plan amendment), they will sue to have the plan declared invalid. In essence, a court that finds a local general plan invalid can strip the locality of all of its land use power. If the general plan is invalid, a city or county cannot enact a zoning ordinance or approve new developments. It cannot approve a project under its subdivision review procedures. Its environmental impact reports are not binding, and in all probability the city or county may not be able to proceed with public works projects. In other words, the entire planning process can be shut down by the court, at least until the city or county approves a new (or amended) general plan that passes legal muster. In El Dorado County, where a court declared the general plan EIR invalid in 1999, the court allowed the county to continue processing development applications under a decades-old general plan until a new plan and EIR was adopted. But the court could have taken more drastic action against

the county. The threat of shutting down a city's planning process (or forcing a city to undertake a costly and time consuming general plan revision) is a powerful incentive for local officials to do things right.

Cities and counties are well aware that a strategic and successful general plan lawsuit could prevent them from acting on an important decision (such as a major development project) in a timely fashion.

A lawsuit challenging the general plan usually challenges its consistency with other planning documents, its internal consistency, or compliance with state laws governing general plans.

A lawsuit challenging the general plan usually challenges one of four areas: consistency with other planning documents, internal consistency, compliance with state laws governing general plans, and adequacy of the EIR.

Consistency with other planning documents. Starting in the 1980s, lawsuits attacked general plans for being inconsistent with the zoning ordinance. The surge of growth-control initiatives that were written as amendments to the zoning ordinance gave rise to this type of litigation.

The first important court case of this sort involved a growth-control initiative in the city of Norco in western Riverside County. The initiative was written as an amendment to the zoning ordinance, but did not seek to change the general plan. The building industry sought to stop the election on the grounds that the initiative would create a zoning ordinance inconsistent with the general plan. *deBottari v. City Council,* 171 Cal. App. 3d 1204 (1985).

This concept was later ratified by the California Supreme Court in a case from Walnut Creek. In 1985, the city's voters approved a growth-control initiative that would limit development in areas with heavy traffic congestion. A prominent landowner sued, claiming the initiative was a zoning ordinance that was inconsistent with the general plan, which called for Walnut Creek to develop into a regional center. The Supreme Court eventually ruled that the initiative was invalid because it was inconsistent with the general plan. *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal. 3d 531 (1990).

Because initiative and referendum powers are protected by the California Constitution, the courts accord them great deference.

Because initiative and referendum powers are protected by the California Constitution, the courts accord them great deference. For this reason, judges usually permit a measure to appear on the ballot even when there is a legal challenge, thereby postponing a discussion on the merits of the case until after the election. In the Norco case, however, the court of appeal stopped the election. The court ruled that because the initiative changed the zoning ordinance but not the general plan, the measure would create a zoning ordinance that was, on its face, inconsistent with the general plan.

For this reason, most growth-control initiatives in California are now written as general plan amendments that direct local officials to change other planning documents to retain consistency, or as both general plan amendments and zoning amendments.

The consistency requirement does not apply to California's 80-plus charter cities, though in practice they often follow the same policy.

It is important to note that the consistency requirement does not apply to California's 108 charter cities, though in practice they often follow the same policy.

Internal consistency. Another favorite legal strategy is to attack the general plan's internal consistency. While most plans do not contain flagrant inconsistencies, general plans are long and complex documents and any judge is virtually certain to find an internal inconsistency if he or she looks hard enough.

The internal inconsistency argument is so fertile that both citizen groups and landowners are likely to rely on it for years to come, especially in the context of growth-related ballot measures. Judges, however, are often reluctant to overturn a voter-approved initiative in its entirety.

Compliance with state laws. A general plan may be the supreme document from which all other local land use policies must flow, but it still must comply with state planning laws. A general plan that does not comply with some aspect of state law may be legally vulnerable.

A general plan that does not include the seven required elements will be struck down as inadequate.

For example, if a city or county prepares a general plan without including the seven required elements, the plan will surely be struck down as inadequate. Just as important, however, is the fact that a general plan may be legally vulnerable if it does not contain the standards required in state law.

Sometimes even the simplest error can lead to legal problems. In challenging the general plan for the city of Riverside, lawyers for a group of landowners sent one of their clerks to city hall to pick up a copy of the plan. However, the clerk returned empty-handed; the city was unable to produce a current copy of the plan and all its elements under one cover. Because state law requires the general plan to be readily available to the public, the lawyers made the plan's unavailability one of the causes of action in the lawsuit. And the courts subsequently declared the Riverside plan invalid, partly because it was unavailable. *Garat v. City of Riverside,* 2 Cal. App. 4th 259 (1991).

More recently, housing developers sued over Measure D, a growth-restricting initiative that Alameda County voters approved in 2000, claiming that it conflicted with the state housing element law. Specifically, developers argued that because the initiative foreclosed building in North Livermore (where 12,500 housing units had been

proposed), the ballot measure discriminated against low- and moderate-income housing development and shifted the housing burden to other jurisdictions. The courts rejected the developers' arguments because the county housing element in effect during 2000 did not include the North Livermore project and because prohibiting development in North Livermore did not preclude the county from meeting its housing obligations elsewhere. *Shea Homes Limited Partnership v. County of Alameda,* 110 Cal. App. 4th 1246 (2003).

Tests for an adequate general plan. In *Curtin's California Land Use and Planning Law,* Daniel J. Curtin, Jr., poses several questions to determine whether a general plan is legally adequate. The list is so good that it bears reprinting here:

Curtin's California Land Use and Planning Law *lays out several questions to determine whether a general plan is legally adequate.*

- **Is it complete?** (Seven elements)
- **Is it informational, readable, and public?**
- **Is it internally consistent?**
- **Is it consistent with state policy?**
- **Does it cover all territory** within its boundaries and outside its boundaries that relate to its planning?
- **Is it long-term in perspective?**
- **Does it address all locally relevant issues?**
- **Is it current?**
- **Does it contain the statutory criteria** required by state law as demanded by the courts? For example:
  - Does the land use element identify areas that are subject to flooding?
  - Are noise contours shown for all of the listed sources of noise?
  - Does it contain adequate standards of population density and building intensity?
  - Does the circulation element responsibly list sources of funding for new transportation facilities?
  - Is the circulation element fiscally responsible?
  - Is the circulation element correlated with the land use element?
  - Does the general plan clearly specify allowable uses for each land use district?
  - Are the density ranges specific enough to provide guidelines in making consistency findings where necessary?
  - Does the housing element contain a program to conserve and improve the condition of the existing affordable housing stock?

  - Has the city adopted an analysis and program for preserving assisted housing developments as part of its housing element?
  - Does the housing element identify adequate sites that will be available through an action program for development of emergency shelters and transitional housing for the homeless?
- **Are the diagrams or maps adequate?** Do they show proposed land uses for the entire planning area? Is the land use map linked directly to the text of the general plan? Are the maps and text consistent?
- **Does it serve as a yardstick?** Can you take an individual parcel and check it against the plan and then know how you can use your property?
- **Does it contain an action plan** or implementation plan?
- **Finally, was it adopted correctly?** Did it receive proper environmental review? Was the draft housing element or amendment sent to HCD for review before adoption?

Strengths and Weaknesses of the General Plan Process

State law focuses heavily on public participation, the approval process, and requirements for technical analysis, but leaves the question of a community's vision to that community.

In assessing the way general plans are crafted in California today, it is important to remember the legal context within which they are prepared. State law focuses heavily on public participation, the approval process, and requirements for technical analysis. But it leaves the question of each community's vision to that community.

This is, perhaps, appropriate. After all, each community knows itself better than anyone else does. But by regulating some aspects of the general plan process and letting others be, the state often sets the priorities for the general plan discussion. The typical general plan process contains a great deal of discussion about densities and population buildouts and noise levels and traffic levels-of-service, but precious little discussion about the vision for a community's future.

This is not always true, of course. Many communities undertake the general plan with an enthusiastic desire to shape their own future. But because of the emphasis on technical analysis, that future is often examined only in terms of the quantitative results—the numbers—that emerge from the technical analysis. And all too often, those numbers are bandied about as a replacement for a discussion of a community's vision.

Take the question of population. Many general plan debates revolve almost entirely around the eventual population—the number of people who will live in the community at the end of the period

covered by the general plan. Community leaders, business leaders, planning commissioners, and elected officials often spend many months debating what that number should be. Should it be 120,000? 140,000? 105,000?

Yet these debates are rarely informed by a real world understanding of what the impact of such a population would be. Pro-growthers want a big target to shoot at, while slow-growthers use the population number as an organizing principle against more development. Lost in the discussion are countless subtleties—including, for example, the fact that the population figure is based on a host of assumptions about household size and the rate of housing construction which are mostly beyond the control of local government.

At the same time, it is hard to argue that California communities should return to the days when the typical general plan was "just an interesting study" and the real planning—such as it was—was accomplished by "good ol' boys" behind closed doors and executed through incremental zone changes that had nothing to do with the plan sitting on the shelf. Instead, the general plan has changed planning in California by imposing a rational process on communities. That process is sometimes too technical or too oriented around numbers; it is sometimes more procedural than substantive; and, in the end, it creates a document that can be changed all too easily. Yet in community after community, the general plan has also provided a focal point for discussion about what the future really should be—and that, after all, is the point of the exercise.

Chapter 7

The Basic Tools

Part 2—Zoning Ordinances and Development Codes

As the history of American planning (contained in chapter 3) reveals, zoning has traditionally had a strong and somewhat independent place in the land use regulation system. Zoning performs the basic chore of dividing a community into districts and prescribing what can and cannot be built on each parcel *Euclid v. Ambler*, the legal opinion on which most American land use regulations are based, upheld not a comprehensive plan nor a development code but specifically a zoning ordinance. Even communities that perform only perfunctory planning (or none at all) often have a zoning ordinance that divides the community into "use districts."

In California, of course, zoning is supposed to be a tool to implement the general plan. The goals and principles of the plan are supposed to be translated into parcel-specific regulations by the zoning ordinance.[1] And in most cities and counties, the zoning ordinance does, in fact, serve as a beast of burden for the general plan. In some places, however, the zoning ordinance remains the primary tool of land use planning even today, partly because it is more easily bent to meet the political needs of any given moment than the general plan can be. As the previous chapter explained, the general plan has been made much stronger over the past 30 years, and localities are finding it harder and harder to use the zoning ordinance independent of the general plan.

In some places, the zoning ordinance remains the primary tool of land use planning, partly because it is more easily bent to meet the political needs of any given moment than the general plan.

1. Zoning ordinances are authorized by Government Code § 65850 *et seq.*

What a Zoning Ordinance Contains

The legal basis for zoning, as for most land use regulations, is the local government's police power. A zoning ordinance must serve to protect the public health, safety, and welfare, and it cannot be, to use a legal phrase, arbitrary or capricious. To meet the constitutional tests laid out in *Euclid v. Ambler,* a zoning ordinance must be both comprehensive and fair. Comprehensiveness means the ordinance must cover every piece of property within the jurisdiction (although some jurisdictions use "unclassified" as a zoning district). Fairness means that while different pieces of property may be assigned to different zones, each piece of property within the same zone must be treated alike.

To meet the constitutional tests laid out in the Euclid *case, a zoning ordinance must be both comprehensive and fair.*

Thus, a zoning ordinance must be a set of parcel-specific regulations intended to implement the policies of the general plan as they apply to every single parcel of land. The zoning ordinance will typically be catalogued as part of the municipal code, along with ordinances covering other typical subjects of local government concern, such as meeting rules, business license taxes, nuisance abatement, and animal control. Often, the zoning ordinance, along with subdivision regulations, design review guidelines, and other planning requirements, will be included in a comprehensive "development code." The development code can run to several hundred pages.

Usually regulations have three dimensions: use, bulk, and what might be called impact or performance.

The typical zoning ordinance is a set of regulations that prescribes or restricts what landowners can do with their property. Usually regulations have three dimensions: use, bulk, and a third dimension that might be called impact or performance.

Use. The use dimension is the most basic characteristic of zoning. Each piece of property falls into a use district, which restricts the type of development that may be built there: single-family residential, multi-family residential, neighborhood commercial, regional commercial, industrial, and agricultural. (See "Use Districts," page 129.)

Every piece of property must be assigned to a district, and the uses permitted in each district must be explicitly spelled out.

But every piece of property must be assigned to a district, and the uses permitted in each district must be explicitly spelled out. It is important to keep in mind that the true purpose of many zoning ordinances remains the protection of the single-family neighborhood from intrusion. (In some cases, the stated purpose is the promotion of economic development in commercial and industrial districts, though, in part, this segregation of uses is also meant to protect single-family neighborhoods.)

Though the use district has been the foundation of zoning for more than 70 years, the remarkable fluidity of today's economy may

be making it obsolete. Already, developers who build low-rise suburban business parks rarely do so with a fixed idea of the use it will contain; it could include anything from a warehouse to a research lab to an office center. (Increasingly, we are seeing not one or another but a combination of all three under the same roof.)

For this reason, new commercial and industrial developments are often being built under a flexible "business park" zoning designation that will permit a combination of these uses. As more and more people work at home on a full- or part-time basis, the traditional prohibition on commercial ventures in residential neighborhoods is also beginning to break down; in 1996, the city of Los Angeles finally created a zoning classification that formally recognizes home businesses.

This blurring of the once-bright line between use districts is certainly an accurate reflection of the nature of American society, which is moving away from a segregation of uses.

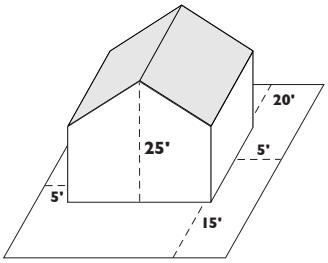
This blurring of the once-bright line between use districts is certainly an accurate reflection of the nature of American society, which is moving away from a segregation of uses. At the same time, it challenges the tradition of establishing a strong set of completely different standards for each zone. Separate parking standards have traditionally been imposed for office, manufacturing, warehouse, and retail use—but what standard should be imposed in a business park that will house an unpredictable combination of these different uses? Does it make sense to require separate parking for each business when some businesses operate primarily at night while others keep 8-to-5 hours? As the economy becomes more fluid, and as real estate in existing cities becomes more valuable, planners will have to grapple with the resulting pressure to break down the traditional barriers between uses.

In recent years, advocates of the New Urbanism have criticized the low-density, auto-oriented dictates of the traditional zoning code, saying that they prevent innovative developers from building old-fashioned pedestrian- and transit-oriented neighborhoods. Additionally, developers of "lifestyle centers" have found that some of the most popular projects mix ground-floor retail with upper-floor offices and residences. And after the bottom dropped out of the San Francisco Bay Area office market during the dot-com bust, some property owners and housing advocates sought to convert offices to housing in struggling business parks.

In response, more than half of California's cities and counties have adopted "mixed use" zoning ordinances, and many of these jurisdictions also report that they have approved mixed-use projects. Some of these projects are nothing more than offices and a

sandwich shop next to a distribution warehouse. But other projects satisfy the New Urbanist desires for traditional, walkable neighborhoods. Sometimes, these New Urbanist-oriented projects are part of downtown redevelopment efforts in which cities seek to bring new life to dilapidated areas. For example, the Mission Promenade project in downtown Pomona fills most of a city block with ground-floor retail, second-floor offices, and condominiums on the top floor. Mission Promenade is across the street from large government offices and on the edge of the Pomona Arts Colony, a lively district with about 20 studios, museums, and art-oriented schools.

And even with mixed-use zoning, planners sometimes still have to make accommodations. For example, the University Village project near the University of California, Riverside, campus mixes offices with nighttime-oriented businesses like a cinema, restaurants, and a nightclub. City of Riverside officials gave the project a significant break in the amount of parking required because they knew that the cinema would not get busy until evening, when the offices would be mostly empty.



Zoning Envelope

The zoning envelope specifies setbacks, height limits, and sometimes limits on the percentage of a site that may be covered by buildings, other structures, and paving.

Bulk. Zoning ordinances typically also create an "envelope" within which any building must fit. This envelope is created by specifying setbacks, height limits, and sometimes limits on the percentage of a site that may be covered by buildings, other structures, and paving. For example, a typical single-family zone may require a 15-foot front yard, a 20-foot back yard, a 5-foot setback from the property line on either side of the house, and a building height of no more than 25 feet. The landowner must construct a house within the resulting envelope. A commercial property envelope will be dictated not only by height and setback limitations, but also by the square footage allowed under a maximum floor-area ratio.

FAR = Floor-area ratio

The floor-area ratio, or FAR, is expressed as a ratio of building square footage to square footage of land—for example, a FAR of 3:1, meaning that for every square foot of land the landowner may build three square feet of building. Thus, a 3:1 FAR on a 10,000-square-foot commercial lot means that the landowner may build a 30,000-square-foot building. But this does not mean the result will always be a three-story building. Because of setback and lot coverage requirements, the landowner might have to build a taller building—four, five, even six stories—to obtain the 30,000 square feet.

Envelopes vary from use to use. Pedestrian-oriented retail districts may not need setbacks; such a district may, in fact, require buildings to run from lot line to lot line and all the way up to the sidewalk.

But industrial zones often specify a maximum lot coverage so that factories are buffered from surrounding neighborhoods, and increasingly commercial and multi-family districts have similar requirements.

Many communities have FAR or lot coverage requirements that dictate a low-density, auto-oriented community. For example, the requirements of the city of Simi Valley zoning ordinance call for the creation of office, retailing, and industrial districts with FARs in the range of 0.20 to 0.32—meaning that parking and landscaping on a typical site will take up two to four times as much land area as the buildings themselves.

Impact/Performance. The last set of requirements in the typical zoning ordinance tries to regulate how a building will perform in the context of its neighborhood. Ideally, these requirements seek to minimize the negative side effects a building and its uses will have. For example, virtually no modern zoning ordinance permits the construction of any building without parking. Parking requirements will vary from zone to zone; a single-family residence may require one or two parking places, while an office building may need four spaces per one thousand square feet of space.

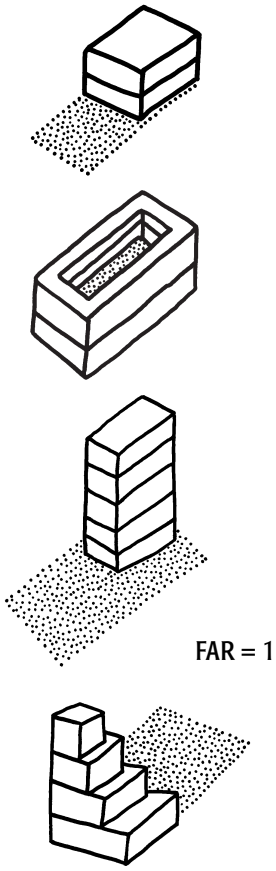
The only exception would be the zoning ordinance for a dense urban area with a good transit system. San Francisco, for example, actually discourages the provision of off-street parking places in some parts of the city. (Though, increasingly, developers in San Francisco and densely built sections of Southern California may be required to contribute funds to a parking authority that constructs parking garages serving an entire business district.)

Similarly, in industrial zones, builders may be required to provide heavy landscaping and berms in order to shield industrial activity from public view.

All three types of requirements play an important role in shaping the look of a new development. The use requirement will dictate that a piece of property in a multi-family zone will be an apartment building rather than a store or a factory. Bulk requirements will set the zoning envelope, establishing, in essence, the building's size and shape. And the impact requirements will assure that the building will provide a certain number of parking spaces. Increasingly, however, the impact requirements drive the entire development process—not the use of the project necessarily, but often its bulk and height.

Take the example of a high-density apartment project in an area that's already built-up. Let's say the property is zoned for 30 apartment units per acre. Theoretically, building a 30-unit apartment

Floor-Area Ratio



Use Districts

THE ORIGINAL ARCHITECTS of zoning imagined that zoning ordinances would contain only a few use districts that would segregate major categories of land uses from one another: single-family homes, apartments, retail, factory. Today, most zoning ordinances have at least 20 use districts, a number that is often multiplied with the implementation of overlay zones. The reason for the proliferation of districts is simple: Under *Euclid v. Ambler,* communities may differentiate among parcels by placing them into different use districts, but every parcel in the same use district must be treated alike. In order to subject many different types of parcels to different requirements and still be constitutional, a zoning ordinance must have many use districts.

For example, Los Angeles County is the nation's largest local government unit, and its zoning ordinance must cover myriad situations, ranging from uninhabited desert to urban areas developed to Manhattan-like densities. The L.A. County zoning ordinance contains 39 different use districts, including 6 for residential areas, 3 for agriculture, 7 for commercial, 9 for industrial, and 14 special districts and overlay zoning districts that accommodate a range of special situations such as billboard exclusion, watersheds, open space, arts and crafts, professional offices in residences, and specific plans.

Even smaller jurisdictions have great variety in their use districts. The city of Redding at the north end of the Sacramento Valley is fairly typical of a mid-sized or suburban city that has updated its zoning ordinance in recent years. With a population of 85,000, Redding has grown steadily since the 1970s but has struggled to build a solid economic base. With 45 square miles and several lightly developed areas inside its boundaries, Redding also has some of the attributes of counties and rural towns. The city adopted a new zoning ordinance in 2003 to reflect a general plan update. Because of the zoning ordinance's newness, it contains a bit more flexibility than many older codes. Some cities have a larger number of residential codes to tightly define the number of units allowed per acre in different zones.

The Redding zoning ordinance (chapter 18 of the Municipal Code) contains 15 basic use districts plus eight overlay zones. As an example of how the zones in a typical ordinance are organized, a brief description of each one appears on the following page. ■

building on a piece of land already zoned for such a purpose should be easy. However, most zoning ordinances require two off-street parking spaces per unit, plus additional parking spaces for guests or visitors (usually one space for every four units). Suddenly, the owner of a one-acre site must build not only 30 apartments but also 68 parking spaces.

This is a much harder task—probably meaning that the developer must forego surface parking and provide spaces within or underneath the apartment building itself. Furthermore, if the area in question has a three-story height limit, the only alternative is to provide underground spaces, which doubles their cost of construction.

A developer boxed in by this kind of zoning envelope—and a substantial impact requirement, such as 2.25 parking spaces per unit—may discover that building the largest project permitted is just too expensive. To cut the cost of providing parking, the developer may have to reduce the size of the project. In this example, the project size is driven by the parking requirement, not by allowable density or the setback requirements.

The landowner is placed in a similar situation when different uses permitted in the same zone—a restaurant and a retail shop, for example—have vastly different parking requirements. A restaurant will usually be required to have far more parking available than a retail shop. The ability of the landowner to open a restaurant will depend not on the zoning, but on the ability to build or secure enough parking. If the parking can't be worked into the project, the landowner may be forced to open a retail shop instead of a restaurant.

Sometimes, performance standards alone dictate the type of building or business a particular parcel of land may handle. Rather than identifying uses, setbacks, or even specific standards, some cities simply require that a building perform to a certain level—for example, producing no more than a certain number of vehicle trips, no matter the use. Sometimes uses may be permitted conditionally only if these performance standards can be met. Performance standards were regarded as a "new wave" of zoning techniques in the 1970s. But they are more difficult and expensive to administer, so most cities still rely on older, more familiar zoning methods.

Recently, New Urbanists have advocated a new approach—the "form-based code"—that focuses on building mass rather than use and performance. (*See* chapter 18.)

Zoning Tools

Within the concept of zoning are many tools that landowners, developers, and cities may use to accommodate projects that otherwise would be unacceptable, or to stop projects otherwise allowed. Traditionally, these tools have permitted developers and elected officials to exert political power

Residential Zones

Rural Lands (RL) Houses on two- or five-acre lots on properties with "relatively extreme topography or… in outlying rural areas."

Residential Estate (RE) Large-lot development of one or two houses per acre.

Residential Single-Family (RS) A variety of suburban environments with two to six units per acre. Duplexes are acceptable.

Residential Mixed Housing Type (RM) Multifamily developments of anywhere from six to 30 units per acre.

Commercial Zones

Neighborhood Commercial (NC) Retail and professional service buildings of up to 30,000 square feet and office buildings of up to 5,000 square feet in a "pedestrian environment."

Shopping Center (SC) Typically 50,000 to 200,000 square feet of retail development with two or more anchor stores. Minimum five-acre development site. A maximum of 75,000 square feet under one roof.

Regional Commercial (RC) "Malls, free-standing retail, power centers, and office and service establishments." Minimum 15-acre site. No maximum building size.

General Commercial (GC) Almost any commercial use. Maximum building size, 60,000-square-feet.

Heavy Commercial (HC) Automobile sales and service, lumber yards, nurseries and wholesale facilities; 60,000-square-foot maximum building size.

Industrial Zones

General Industry (GI) Businesses with a limited impact on adjoining neighbors. Maximum floor-area ratio of 0.40, and minimum 20,000-square-foot lots.

Heavy Industry (HI) "The broadest range of industrial uses," including quarries. Maximum FAR of 0.50 and one-acre minimum lot size.

Other Zones

Open Space (OS) Floodplains, 20 percent slopes and lands subject to open space easements.

Public Facilities (PF) Schools, government offices, hospitals, parks, airports, etc.

Overlay Zones

Airport Environment Overlay (A) Restricts building heights around Benton Airpark.

Floodplain Overlay (FP) Covers land near rivers and streams and is based on Federal Emergency Management Agency flood maps. Prohibits new development within the 100-year floodplain and allows limited development in the "flood fringe" with a conditional use permit.

Mineral Resources Overlay (MR) Restricts housing development to one unit per 40 acres and limits commercial uses to utilities.

Planned Development Overlay (PD) "Where greater flexibility in design is desired to provide for a more efficient use of land." Requires a Planned Development Plan that addresses proposed uses and buildings, topography, development schedule, design concepts, and other details.

Mixed Use Overlay (MU) Can be combined with any residential, offic,e or commercial zone. The City Council "may delete permitted or conditionally permitted uses, may designate conditionally permitted uses as permitted uses, or many require site development permits or use permits for all uses."

Mixed Use Neighborhood (MU-N) In residential zones, 20 to 160 acres. Allows some office and commercial development. Also allows more intense development in a "mixed use core" around a transit stop. Requires building orientations and street design to facilitate walking.

Design Review (DR) Requires a site development permit or use permit for anything except a single-family home on an existing parcel.

Specific Plan (SP) Allows a Specific Plan to supercede the underlying zoning.

over the land use process, whether or not the project in question conforms with local plans. The growing strength of the slow-growth movement and the power of the general plan have made this kind of political manipulation more difficult to achieve, though it still exists. More frequently today, some of these tools (principally discretionary review) are used to make otherwise acceptable projects more difficult to build.

Zone Changes

The most obvious method of permitting a project that otherwise would not be allowed is to change the zoning on the parcel of land in question.

The most obvious method of permitting a project that otherwise would not be allowed is to change the zoning on the parcel of land in question. And, indeed, this is the classic route landowners take. City councils and boards of supervisors have always shown a willingness to change zoning if the project proposed is something they really want built. (This is true not only of projects proposed by developers with political influence, but also of projects desirable for the tax revenue or prestige they would bring to the community.) Zone changes are "legislative" in nature under California law, even if they involve only one parcel of land. This designation means that all zone changes are, essentially, policy statements by the city or county. Therefore, they must be approved by the legislative body—the city council or board of supervisors—after a public hearing, and they are subject to initiative and referendum. They are also subject to the provisions of the California Environmental Quality Act.

In the past, spot zoning was probably the most abused type of zoning change.

In the past, spot zoning was probably the most abused type of zoning change. Spot zoning essentially grants one parcel of land a designation that is incompatible with the rest of the neighborhood, but probably affords the landowner an economic windfall. Spot zoning, for example, might designate one house in a residential area for retail use, or one commercial parcel along a pedestrian-oriented strip for an automobile body shop. In theory, spot zoning is legally vulnerable, because all parcels in a zone have not been treated alike—one has been moved into a new zone, while others have not.

In practice, the strengthened legal status of general plans has made spot zoning and other questionable zone changes much more difficult to achieve. In decades past, the zoning designation on a parcel of land could be changed without much consideration for the general plan. Now, however, a zone change that creates an inconsistency with the general plan is legally vulnerable. Therefore, zone changes and general plan amendments are typically processed

together in order to avoid inconsistencies. This practice serves to reduce the number of zone changes (because general plan amendments are restricted to four per year) and can sometimes heighten public awareness of the proposal, especially if the city or county has recently been through a major general plan revision.

Variances

A variance is a permit that allows a landowner to do something he couldn't otherwise do.

As the name suggests, a variance is a permit that allows a landowner to do something he couldn't otherwise do. Traditionally, zoning has encompassed two types of variances: The so-called "use variance," which permits an otherwise unacceptable use on the property without changing the zone, and the "variance from standards," which permits the landowner to construct a building or open a business without having to comply with the standards required of other landowners in the same zone. Use variances are not permitted under California law, but variances from standards are common. (The legal limitations on variances are contained in Government Code § 65906.)

On paper, the variance serves a useful purpose by providing for a "hardship" exemption. It permits a landowner to make use of his property even if something about that property prevents the landowner from fully complying with the zoning ordinance.

But such a hardship should be associated with the land, not the owner. The classic example involves a residential lot that is identical in size and shape to the surrounding lots, but suffers from the presence of a large, immovable boulder. In this instance, a variance waiving ordinary setback requirements may permit the landowner to build a house, even though the boulder makes construction of the house within the normal zoning envelope impossible.

Economic hardship cannot form the basis for a variance because an economic problem, unlike a geologic problem, is self-inflicted.

Beyond the geologic impediment, the legal authority for a variance is vague. California court opinions are split on whether a lot with an odd size or shape constitutes a hardship. Under other conditions, variances are not legally acceptable. In particular, economic hardship cannot form the basis for a variance because an economic problem, unlike a geologic problem, is self-inflicted.

These legal limitations have not prevented many cities and counties from using the variance when it is politically expedient. In all of planning, probably no tool has been more widely abused, simply because it is so tempting. If a zone change would be politically difficult to achieve, a variance is likely to attract much less attention. If a favored landowner can almost (but not quite) meet

the standards required in a particular zone, and the city wants the project, then a variance offers a convenient solution. In some pro-development communities, planners may actually encourage variance applications, knowing that moving one through the political process is not difficult.

In the city of Los Angeles, for example, the owner of a gas station just off the Pacific Coast Highway sought a variance so that he could add a car wash. A neighbor fought the proposed variance, yet the variance request passed through the city zoning administrator, the planning commission, and the city council without a single dissenting vote. But when the neighbor kept fighting, a state appeals court found it easy to overturn the variance. Pointing out that the property owner had invested $144,000 in new gasoline tanks shortly before applying for a variance, the court ruled that there was no evidence the zoning conditions imposed a hardship necessitating a variance. *Stolman v. City of Los Angeles,* 114 Cal. App. 4th 916 (2003).

A variance is quasi-judicial, which means that the planning commission's approval is binding (unless appealed to the city council) and that it cannot be placed on the ballot by initiative or referendum.

Whether or not it is difficult to achieve, a variance perverts the process when broadly used. Unlike a zone change, a variance is quasi-judicial, not legislative. This designation means that the planning commission's approval is binding (unless appealed to the city council) and also that it cannot be placed on the ballot, either by initiative or referendum. A variance is quasi-judicial because, at least in theory, it does not deal with policy issues, but, rather, with the application of city policy to one particular case. A variance may be passed by resolution, not by ordinance, which means that it may take effect immediately following a short appeals period. (An ordinance must receive two readings before a city council or board of supervisors, and have a 30-day waiting period before it is enacted.)

A variance that facilitates a use otherwise not allowed is really a zone change in disguise.

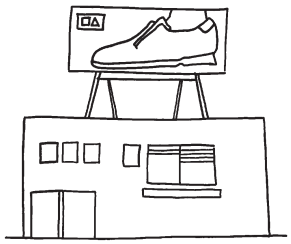
A variance that deals with a geologic problem clearly constitutes nothing more than the application of city policy to an unusual case. But any other kind of variance is simply an insidious way of shielding a policy decision from broad public debate. A variance that facilitates a use otherwise not allowed—such as the car wash at the Los Angeles gas station—is really a zone change in disguise. A zone-change decision is clearly a political decision, but at least it is made in an overtly political forum—before the legislative body, with voters having the recourse of initiative and referendum.

Nonconforming Uses

As zoning ordinances change over time, inevitably many structures that don't conform will be left over from previous eras—a corner

store in a residential neighborhood, for example. In many traditional zoning schemes, these nonconforming uses were simply permitted to continue indefinitely, as long as they did not expand or change the nature of their business. More recently, zoning ordinances have been less tolerant over the long term, requiring that nonconforming uses be phased out over a period of years. Generally speaking, the courts have permitted this "amortized" approach.

The problem of nonconforming signs, however, has been much more controversial. As more and more local governments have passed strict sign ordinances, the advertising industry has used its clout in Sacramento to restrict the ability of localities to eliminate nonconforming signs. (An indication of the advertising industry's influence in this area lies in the fact that while local government power to restrict signs is located in the Government Code, the limitations on that power are included in the Business and Professions Code (§§ 5200–5486), where laws sponsored by specific industries are typically spelled out.) While their power to restrict signs is broad, local governments usually can't require the removal of a nonconforming sign unless the owner is compensated. Localities can require that a sign be phased out over a period of time without compensation, but the amortization periods are specified by the state. Bus. & Prof. Code § 5412.1.



Local governments usually can't require the removal of a nonconforming sign unless the owner is compensated.

Conditional Use Permits

CUP = Conditional use permit

A conditional use permit, or CUP, represents another tradition in the zoning field that offers a middle ground between a zone change and a variance. CUPs allow a local government the ability to permit specific uses that might not otherwise be allowed, as long as the landowner or business owner meets certain conditions.

Like the variance, the conditional use permit was originally conceived as an escape valve for a property owner, so that the zoning ordinance could pass constitutional muster. Its basic goal is to permit the full range of land uses required for a community to function, while still giving the community some control over individual situations that could cause conflict. In many communities, the CUP constitutes the bread-and-butter work of the planning commission, which holds public hearings and imposes conditions in CUP cases. (In some cities, staff-level hearing officers may also deal with CUPs, with the planning commission as an appeal body.) CUPs are quasi-judicial actions, and therefore the planning commission decision is final unless appealed to the city council or board of supervisors.

The basic goal of a CUP is to permit the full range of land uses required for a community to function, while still giving the community some control over individual situations that could cause conflict.

In a typical case, the CUP process focuses on the type of business being proposed, rather than on the underlying size of the building or location of the property. A CUP will often focus on a business that is similar to one permitted under the zoning ordinance by right, but which has some potential for detrimental side effects. For example, a zoning ordinance may permit a convenience market or neighborhood grocery store on a commercial strip by right, but allow the establishment to sell liquor only with a CUP. The CUP typically imposes additional restrictions, such as those limiting business hours. Other uses subject to a CUP process include sex-oriented businesses, restaurants with liquor licenses, churches, and industrial businesses in close proximity to residential neighborhoods.

Because it is typically used to regulate businesses located close to residential areas, the CUP process can become the battleground for neighborhood disputes.

Because it is typically used to regulate businesses located close to residential areas, the CUP process can become the battleground for neighborhood disputes. In the context of a CUP, the disputes often turn on whether the owner can be subjected to additional conditions once the business is in operation. Thus, CUPs often lead to legal questions about vested rights.

After the 1992 Los Angeles riots, for example, the city of Los Angeles sought to impose conditional use permits on the reconstruction of liquor stores in South-Central L.A., which has a high concentration of such businesses. Liquor store owners sued, claiming that state alcohol control laws took precedence. The liquor store owners lost.

Recent court rulings on the question of CUPs and vested rights have helped business owners.

On the other hand, recent court rulings on the question of CUPs and vested rights have helped business owners. One important case involved the Goat Hill Tavern, a restaurant that conducted business adjacent to a residential neighborhood in Costa Mesa for some 40 years. Though the restaurant was a nonconforming use, a beer garden added in 1970 was subject to a city conditional use permit. After complaints from neighbors, the city extended Goat Hill Tavern's CUP for only three months at a time. But when the city finally denied a three-month renewal, the tavern sued, and the court of appeal found that the longstanding nature of the CUP had established a property right for the owner. Though it had been extended for only three months at a time, the CUP could not be revoked without compensating the tavern's owner. *Goat Hill Tavern v. City of Costa Mesa,* 6 Cal. App. 4th 1519 (1992).

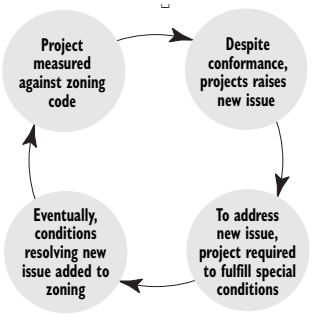
A more recent decision bolstered property owners' rights. During the 1990s, the city of San Diego began requiring new stores that sell alcoholic beverages to get a conditional use permit. Existing stores were "grandfathered," meaning the CUP requirement did

not apply. When the state suspended Hilltop Liquor's liquor license for 60 days for selling alcohol to a minor, city officials said the nature of the business changed, meaning the grandfather provision no longer applied and the store would have to apply for a CUP. The store owner applied for a CUP, which the City Council denied. The store owner sued and a court ruled that the store owner had a vested right, and that the city could not revoke that right unless it provided a full hearing and made a decision based on all available evidence. *Bauer v. City of San Diego,* 74 Cal. App. 4th 1281 (1999).

Although usually dealing with the operating conditions of a business, rather than its underlying land use, CUPs are important in California land use planning because they are part of the legal tradition that has permitted the emergence of an important additional tool: discretionary review.

Discretionary Review

Most aspects of the zoning ordinance are designed to yield a "yes" or "no." A landowner may build a house in a residential neighborhood but not a store. A developer may build a 30-unit apartment building on a particular parcel of land if certain requirements are met (setback, parking, etc.), but not if the requirements are not met. In recent years, however, many cities have begun to emphasize one aspect of zoning designed to yield an answer of "yes . . . if."



Discretionary Review
to describe what is essentially a circular process

Discretionary review is a process that permits local officials, usually the planning commission, to review a specific development proposal and either attach conditions or deny approval. Even a proposal conforming to the paper requirements of the zoning ordinance must be reviewed by the planning commission, which may or may not give its approval. In recent years, many cities have expanded the boundaries of discretionary review to include not just potentially incompatible uses, but essentially all projects over a certain size.

The concept of discretionary review builds on the CUP process, which permits planning commission review of individual cases even if the use is allowed under the zoning ordinance.

The concept of discretionary review builds on the conditional use permit process, which permits planning commission review of individual cases even if the "use" in question is allowed under the zoning ordinance. This expanded use of discretionary review is not really a logical extension of the 1950s pig-in-the-parlor concept of a conditional use permit. Rather, it's a response to citizen demand for more open decisionmaking, because it opens up for public debate many projects that wouldn't otherwise come before a public body.

A trailblazer in this area has been the city of San Francisco. The San Francisco city charter contains one line permitting the

planning commission to review development projects at its own discretion. The commission and the city planning department have not been timid about using this phrase as the legal basis to review a vast array of projects, large and small. Many other cities have followed suit. During times of economic recession, landowners and businesses join with property rights activists and conservative politicians to demand a scaling back of discretionary review, arguing that such review makes a city or county "uncompetitive." Some cities and counties even respond with "streamlined" processes. But few local governments are willing to give up much authority.

In many respects, the expanded use of discretionary review has been influenced by the California Environmental Quality Act, which encourages a spirited public debate on the environmental aspects of a project, whether or not it conforms to zoning. CEQA's case-by-case analytical structure has prompted many communities to expand the range of projects they will review with discretion, because the projects will be reviewed individually under CEQA. (For more information on the CEQA review process, *see* chapter 9.)

CEQA = California Environmental Quality Act

Of course, local politicians often prefer discretionary review, because the process allows them to approve or reject a project depending on the current political situation, no matter what the local codes say. And, in practice, cities also use discretionary review to gain leverage over a developer. On a complicated project, a conditional use permit may impose several dozen conditions. While some of these are associated with the "conditional use" being considered—a store's hours of operation, for example—others are really exactions, imposed in response to political pressure and perceived planning problems. ("Exactions" are conditions or financial obligations imposed on developers to deal with specific problems arising from the development in question, such as traffic, housing, and open space. Exactions are discussed in detail in chapter 10.)

On a complicated project, a conditional use permit may impose several dozen conditions.

Conditions imposed on a development through discretionary review may call for anything "reasonably related" to the project—the planting of a large number of trees, the construction of affordable housing, the payment of a traffic mitigation fee. Design review (sometimes known as architectural review) also falls under the category of discretionary review, and can lead to a separate set of conditions specifying anything from the placement of dumpsters to the color of the building.

Many times, the discretionary review process is really the beginning of a policy cycle. An issue that pops up during discretionary

review will be dealt with on a case-by-case basis at first. But eventually, requirements based on the case-by-case experience are included in the zoning code. Many exactions and impact fees have become established city policy in this way. Partly because of discretionary review, however, the cycle is never-ending: New problems (both planning and political) are always discovered in discretionary review, new conditions are imposed, and eventually new exactions are institutionalized in the zoning ordinance.

Discretionary review provides both the city and its citizens with many opportunities that wouldn't otherwise exist. At the same time, it makes the development process a lot longer and less predictable. Developers don't always know what kind of project they'll wind up with in the end, or how expensive it will be. It's also hard to predict in advance whether any agreement between developers and city staff (or between developers and angry citizens) will hold up in front of the planning commission or city council.

Code Enforcement

As the number of conditions imposed on developers has grown, so has the importance of code enforcement. Yet, historically, code enforcement has been a virtually forgotten area of land use planning. Often, code enforcement officers aren't even in the same division of city government with the planners who craft all the conditions. Rather, they're often attached to the building and safety department, because the bulk of their job consists of responding to citizen complaints about possible code violations—a neighbor who is constructing an addition to his house without a permit, for example.

Findings

ONE OF THE MOST IMPORTANT, BUT ABUSED concepts in planning is the concept of "findings." A set of findings is simply meant to be the rationale that a city council or planning commission uses in making a decision. In the words of the landmark court case on the subject, findings "expose the agency's mode of analysis" and "bridge the analytical gap between raw data and ultimate decision." *Topanga Association for a Scenic Community v. County of Los Angeles,* 11 Cal. 3d 506 (1974). In short, findings should discuss the reasons why a city or county has decided to take a certain action.

The legal purpose of findings is to give judges a way to assess the local government's decision if that decision is challenged in court. With a few exceptions, localities don't need to draw up findings for legislative actions such as zoning ordinances and general plan amendments, because these are presumed to be policy statements. But quasi-judicial decisions must be supported by findings, so that it is clear how a city or county is applying its policy to a particular case. Thus, findings are required for such actions as conditional use permits, variances, subdivision approvals, and other development permits.

State law requires findings for a variety of other actions that are legislative in nature, such as general plan consistency, moratoria on residential construction, and growth-control ordinances. (However, findings are not required for initiatives that control growth.)

Findings are also required under the California Environmental Quality Act when a project is approved through a "statement of overriding considerations"—a statement indicating that the project is needed even though it will have significant environmental effects. In one court case, the court of appeal struck the approval of a development project on Bethel Island in the Sacramento-San Joaquin River Delta because the findings on which the statement of overriding

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considerations was based referred to the need for "an effective jobs/housing balance" even though no evidence in the record identified such a problem. This was not to say that a jobs/ housing balance wasn't a problem in the Bay Area—the court admitted it was—but merely that the county had failed to include this information in the record. *Sierra Club v. County of Contra Costa,* 10 Cal. App. 4th 1212 (1992).

As the Bethel Island case indicates, findings are supposed to present the evidence a city council or planning commission considered and then explain how that evidence laid the groundwork for the decision that eventually was made. The findings will then be attached to the decision itself as part of the permanent record.

In fact, findings are often poorly written, typically constituting little more than an after-the-fact rationale for governmental action. Most findings are made up of boilerplate material, and rarely will they go on to cover what they're supposed to cover: the evidence on which the decision is based, and the connections between the evidence and the case at hand.

In one situation in Ventura County, the findings attached to a development approval simply restated the county's planning standards in conclusory fashion. The relevant county code sections contained standards that were posed as a series of questions—for example, "Is [it] compatible with the character of surrounding development?" The findings simply turned the question into a statement (adding a negative) and stated: "The proposed development, as conditioned, would not be compatible with the residential character of the surrounding community." Based on these findings, the board of supervisors rejected the project.

Nevertheless, the court of appeal affirmed this approach to writing findings, saying that the facts supporting the decision were clearly incorporated by reference into the decision—precisely what Contra Costa County did not do in the Bethel Island case. *Dore v. County of Ventura,* 23 Cal. App. 4th 320 (1994). ■

To many code enforcement officers, the complicated conditions imposed on a modern development project simply constitute an annoying distraction from their bread-and-butter work. At the same time, however, planners seldom take responsibility for code enforcement; they rarely investigate whether conditions have been met, assuming instead that investigation is the job of code enforcement.

Zoning violations are usually misdemeanors, meaning that a property owner who is cited is thrown into criminal court. Even when code violators are caught and cited, local governments have difficulty motivating property owners to comply with the law. The property owners may pay a fine and promise to clean up their act, but in all likelihood they won't change the way they do business—for two reasons. One is that code enforcement officers are usually overworked, and property owners know it will be a long time before the officers get around to doing follow-up. The second reason is that the threat of further punishment usually doesn't exist.

A retail business—a drive-through restaurant next to a residential area, for example—that is violating conditions of approval by staying open late can probably make more money by continually paying fines than by closing on time. In order to take any more serious action, most cities must depend on the county district attorney to press charges. And a busy district attorney's office concerned with murder and rape isn't going to assign high priority to a neighborhood dispute over a late-night hamburger stand.

Some cities have tried to deal with this problem by "downgrading" zoning violations from a misdemeanor to an infraction. This action permits code enforcement

officers to issue tickets, just as a Highway Patrol officer does, and places the burden on the property owner to go into court and defend himself. A few cities have experimented with code enforcement by hiring their own city prosecutor who is empowered to take code enforcement problems to court.

But even then there are problems. A property owner charged with a misdemeanor will usually correct the violation prior to an appearance in court, which will often lead the judge to dismiss the charge. Furthermore, many cities don't regard a violation of conditions imposed via discretionary review as a true violation of the zoning ordinance. If the conditions are construction-related (using a particular type of window, for example), the city can simply withhold the certificate of occupancy, which the landowner needs to occupy the building, until the conditions are met. (Of course, for many structures, certificates of occupancy aren't required.) However, if a condition related to the building's operation is violated (no carpooling program five years later, for example), the city may have no recourse if the violation is not considered a true violation of the zoning ordinance. Compared with neighborhood nuisances and true zoning violations (substandard or unpermitted building construction, improper use for the zone, etc.), discretionary conditions are given low priority indeed—and often they are never implemented at all.