

# **California's Open Meeting Laws and Ethics Requirements**

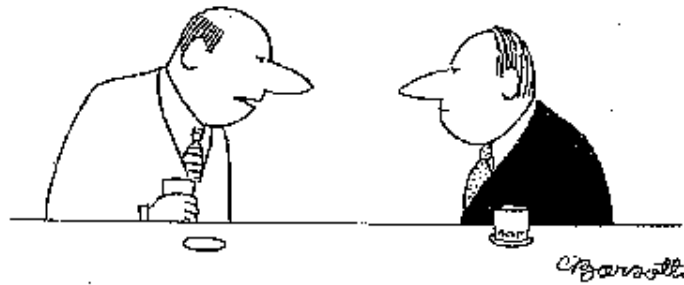
**Training and Discussions on Transparency  
and  
Good Conduct for Public Officials**

**Chula Vista City Council Workshop  
December 5, 2013**

**Presented By: Glen R. Googins, City Attorney and  
Simon Silva, Deputy City Attorney III**

# Presentation Outline

- I. Brown Act Overview
- II. Ethics Overview
- III. Training Exercise
- IV. Questions & Answers



*"I consider myself a passionate man, but, of course, a lawyer first."*

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# The Ralph M. Brown Act

- Cal. Govt. Code §§ 54950, et. seq.



# Core Principles

- Local agencies can only deliberate and take actions at public meetings
- Public must be notified in advance of all meetings and matters to be considered
- Public must be given access to information and opportunity to provide input to decisions-makers
- Exceptions are limited

# Application: Who is Subject to the Act?

- Applies to all local “legislative bodies”
  - City Councils and County Boards
  - Boards and commissions
  - Sub-Committees of a legislative body, with limited exceptions
  - Regional Boards
  - BIDS and PBIDs per Streets and Highway Code
- Does not govern conduct of City staff

# Definition of “Meeting” Conventional

- Any congregation of a majority of the members
  - at the same time and place
  - to hear, discuss or deliberate
  - an issue in the subject matter jurisdiction of the body
- No action is required; “Mere” discussions qualify
- Includes informal gatherings, with or without public attendance or City sponsorship

# What Else is a Meeting?

Other forms of communication constituting a “meeting” include:

- Writings: Written communication, including e-mails, between a majority of the members
- Serial Communications: a chain of communications from member A to member B, then member A or B to member C (until a quorum of members contacted)
- Intermediary Communications: communications between employees or agents on behalf of a majority of members



## - Examples of Each:

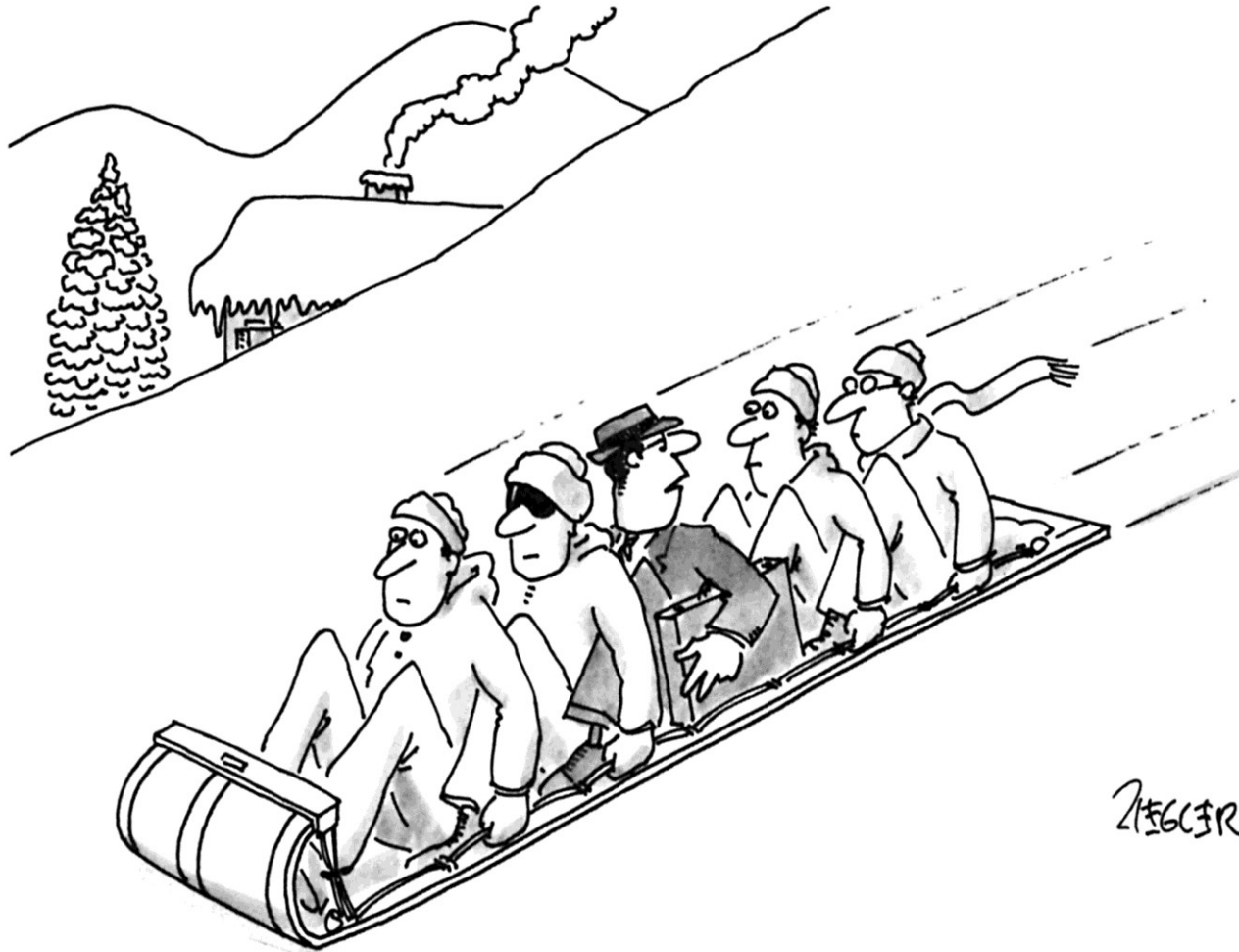
- Email between two Planning Commissioners regarding their support for a project, with copies to two other Planning Commissioners
- One City Councilmember to another: “I’ve talked with so and so and he thinks. . .”
- A department head tells a City Council person that two other City Councilmembers are “onboard” with a pending item.

# Meeting Exceptions

- Not a “meeting” if a majority of members attend:
  - Conference open to the public
  - Open and publicized local public meeting
  - Open, noticed meeting of another body
  - Social or ceremonial event
  - Open, noticed meeting of a standing committee (but can’t participate)
- Still cannot discuss any matters within City’s jurisdiction unless part of program
- Meeting must be publicized open to the public
- Gray area: seek legal advice first
  - Often advisable to notice the meeting or limit attendance to less than majority

# Meeting Exceptions (cont'd)

- Memoranda from City Manager or City Attorney to all City Council Members
- Individual contacts or conversations between less than a majority of members and a member of public



ZIEGLER

*“Look, I’m not saying it’s going to be today. But someday—someday—you guys will be happy that you’ve taken along a lawyer.”*

# Meeting Rules

## 1. Proper Notice

- In Advance
  - 72 hours Regular Meeting
  - 24 hours Special Meeting
- Indicate location and time
- Description of Items to be Discussed
- Posted and Mailed to Those Requesting

# Meeting Rules

## 2. Qualified Location

- Must be held within the jurisdictional boundaries of the City, unless a specific exemption applies
  - Comply with a law or court order
  - Inspect property outside of city
  - Multiagency meeting
  - No meeting facility within the jurisdiction
  - Meeting with federal or state officials on a legislative or regulatory issue
  - A facility outside of the City, which is the topic of discussion
  - Closed session at legal counsel's office regarding pending litigation when it would reduce legal fees or costs
- Location must be ADA accessible.
- Remote attendance by teleconference possible.
- City Charter §308 also governs meeting location.

# Meeting Rules

## 3. What You Can Talk About

- Only items listed and clearly described on timely posted agenda can be discussed or acted upon
  - Agenda must include a clear description of each item to be considered (generally need not exceed 20 words)
  - Should reference what is sought regarding the item (approval, direction, etc)
- If any question, better not to act

# Meeting Rules

## 4. What You Cannot Talk About

- Cannot consider, discuss, deliberate or take action on matters not on the agenda
- Otherwise, only appropriate action is to refer item to staff and/or for consideration on a future agenda
- Brief response, question or statement o.k.
- Limited Exceptions:
  - Majority vote determines an “emergency” exists; (e.g. crippling natural disaster, terrorist act, or major work stoppage); or
  - Two-thirds (4 of 5) vote determines the need to take immediate action exists and agency knowledge of need arose after the agenda was posted



# Closed Session: The Exception, Not the Rule

- The Act limits what can be discussed behind closed doors to specified topics and circumstances
  - License/Permit Determination for rehabbed criminal (§54956.7)
  - Real Property Negotiations – Price and Terms (§54956.8)
  - Existing Litigation [§54956.9(a)]
  - Anticipated Litigation [54956.9(b)]
  - Liability Claims (§54956.95)
  - Threat to Public Safety/Services [54957(a)]
  - Public Employee Appointment/Employment/Performance Evaluation/Discipline/Dismissal/Release [54957(b)]
  - Labor Negotiations (§54957.6)

# Closed Session: Not Available to Most Boards and Commissions

- General Rule for Most Boards and Commissions: No legal basis for closed session
- Closed Session may be used in very limited circumstances by:
  - Mobile Home Rent Review Commission
  - Planning Commission
  - Civil Service Commission
  - Board of Appeals
  - Board of Ethics
- To discuss final decisions legal challenges or remands
- Only go in on advice from legal counsel

# Closed Session: Confidentiality

- Confidential information obtained during closed session cannot be disclosed outside the session
  - Confidential information includes City negotiating positions in real estate and labor talks, and City vulnerabilities or settlement positions in litigation
- Only a majority vote of the legislative body can authorize disclosure
- Penalties for unauthorized disclosure include referral to the grand jury, injunctive relief, and disciplinary action

# Rights of the Public:

## 1. Attendance

- Public must be allowed to attend, observe and speak at meetings
- Cannot be required to register, or fulfill any "condition precedent" to attendance; can be requested, on voluntary basis
- Allowed to record the meeting with audio or video recorder; take photographs

# **Rights of the Public:**

## **2. Access to Materials**

- Allowed to review agendas and other documents distributed to a majority of the board
- If distributed less than 72 hours prior to meeting, documents must be made available at public location

# Rights of the Public:

## 3. Public Comment

- Regular Meeting
  - Agenda Items: Comment must be allowed; reasonable time limits can be adopted
  - Non-agenda items: Agenda must provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public within its purview
    - No action or discussion can occur
    - Can refer to staff for information; request a report back; request item be placed on future agenda

# Rights of the Public: Public Comment (cont'd)

- Special Meeting
  - Must allow comment on agenda items
  - Comment on non-agenda items is permissible but not required
- Criticisms and Complaints
  - Must be allowed
  - Disruptive behavior does not have to be tolerated

# Violations of the Brown Act: - Remedies and Penalties -

## ■ Civil Remedies

- Can be brought by any interested person or DA
  - Invalidation Action: to void past acts
  - Injunctive or Declaratory Relief: to prevent future violations
- Procedural requirements allow opportunity to cure and correct action taken
- Costs and attorneys' fees may be awarded against agency; City may recover fees if lawsuit is frivolous.

## ■ Criminal Penalties

- Member may be subject to misdemeanor penalties if:
  - Attends meeting at which action taken violates the Act; and
  - Intends to deprive public of information
- "Action taken" includes a collective decision, commitment or promise by a majority



“[Once upon a time] a sole practitioner is starved for business in a small town. A second lawyer arrives and they both prosper”

Deborah L. Rhode, Author

*In the Interest of Justice; Reforming the Legal Profession*

# **Brown Act: - Key Topics -**

# Key Topic:

## -Ex parte Communications-

- *Ex Parte* Contacts: Individual contacts or conversations between a member of the legislative body and a member of the public are permissible
- Due process concerns: In quasi-judicial matters (decisions impacting an individual's rights, e.g., issuance of a CUP or personnel discipline) – *ex parte* contacts raise fairness, bias, and impartiality concerns because opposing parties do not have the opportunity to hear and rebut information provided by other side

# Key Topic:

## Social Media and the Brown Act

- Increased Risk of “Serial” Meetings
- Increased Risk of Bias “Pre-determination” and Due-Process violations
- Emails, Texts, Tweets or Posts during meetings deny Public Access to Decision Making Process
- Brown Act applies, but no case law exists to clarify how and when

# Key Topic:

## - Subcommittees -

- The Act generally applies to all boards, commissions, committees and other bodies created by charter, resolution or formal action of a legislative body
- Applies whether the body is permanent or temporary, advisory or decision making
- Limited Exception – A true “Ad Hoc” Subcommittee
  - Comprised solely of less than a quorum of the members of the appointing body; and
  - Does not have continuing jurisdiction over a particular subject matter
  - Cannot have members of other legislative bodies or other 3<sup>rd</sup> parties
  - Limited duration: ideally 6 months or less
- Many gray areas. Seek City Attorney advice

# Practice Tips for Brown Act Compliance

1. Avoid sharing info about another council/committee/commission member's views;
2. Do not direct or cc emails to a quorum or more of your council/board colleagues, or "reply all" on city business;
3. Refrain from public statements (including use of social media) that state final positions on matters pending before you;
4. Review Agendas in advance of meeting and think about Brown Act parameters;
5. Don't discuss items not on agenda; instead, refer them to staff for future discussions with consensus of your board;
6. Don't forget to allow for public input
7. When in doubt, don't act;
8. Seek advice from City Attorney's office in advance whenever possible.

# Conclusion

## Essence of Brown Act

- City Council, Board & Commission business must be conducted at Public Meetings.
- All persons have a right to be notified of, attend and participate in the meetings.
- Compliance is key to earning and keeping public trust. Takes knowledge, discipline and integrity.

# Additional Resources

- Attorney General Website:  
[ag.ca.gov/publications/brownact2003.pdf?](http://ag.ca.gov/publications/brownact2003.pdf)
- League of California Cities Publication:  
“Open & Public IV: A Guide to the Ralph M. Brown Act”  
[www.cacities.org/resources/publications](http://www.cacities.org/resources/publications)
- Contact City Attorney



“The church is close, but the road is icy.  
The Tavern is far, but I will walk  
carefully.”

- Russian Proverb

# ETHICS

“People who try hard to do the right thing always seem mad.”

- Stephen King, The Stand

# Ethics

- Ethics involves the rules (whether they are laws or guiding principles) by which we conduct ourselves.
- There are many rules which govern the conduct of public officials. We are covering some common rules, but not all. This is not AB1234 training.
- “In civilized life, law floats on a sea of ethics.”  
--Earl Warren, 30<sup>th</sup> Governor of California and  
14<sup>th</sup> Chief Justice of the U.S. Supreme Court
- Two concepts to keep in mind:
  1. Put the public's interest above your own
  2. Obtain no personal gain from your position

# ETHICS

We are going to cover some of the ethical rules/laws.

## 1. Conflicts of Interest

- Political Reform Act
- Government Code section 1090
- Common Law Doctrine Against Conflicts of Interest

## 2. Quasi-Judicial vs. Legislative Roles

## 3. Gifts

## 4. Post Employment

## 5. CVMC 2.01 [Code of Ethics]

# Political Reform Act ("PRA")

- Under the PRA, a "Public Official" may not take part in any governmental decision in which the official has a disqualifying economic interest.
- A Public Official has a conflict of interest when it is reasonably foreseeable that the decision will have a material financial effect on his or her specified economic interests covered
- If there is a conflict recusal is required.

# PRA –Economic Interest

- THIS IS WHERE YOU SHOULD BEGIN YOUR INQUIRY
  
- Economic interests include:
  - Business Entities-Over \$2,000 interest or Management position
  - Real Property Interest- Over \$2,000 (or within 500 feet of subject of decision)
  - Sources of Income-Over \$500 within 12 months of decision
  - Sources of Gifts: Over \$440 within 12 months of decision
  - Personal Financial Effects-Personal incomes, expenses, assets, or liabilities of the official or immediate family
  - Exception: Campaign contributions to City Councilmembers are not gift. Other Board and Commission members must consider if in excess of \$250

# PRA-8-Step Analysis

- PRA regulations provide for an 8-step analysis
  1. Is the individual a Public Official?
  2. Are they making, participating in the making, or influencing a governmental decision? (It is more than simply voting)
  3. Does the public official have one of the five qualifying types of economic interests?
  4. Is that economic interest directly or indirectly involved?
  5. Will the decision have Material Financial Effect on economic interest? (Direct it is presumed)
  6. Is it reasonably foreseeable that the economic interest will be materially affected?
  7. Public Generally-significant segment
  8. Legally Required Participation

# PRA

## ■ Practice Tips:

1. Know your economic interests
2. Ask yourself--does the decision impact in any way my economic interest?
3. If it does, seek assistance
4. Remember making a decision is more than voting, it includes influencing that decision
5. When in doubt, consider recusal
6. Recusal must be done BEFORE item is discussed. Best practice is to leave the room.



# Government Code section 1090

- Government Code section 1090 deals with the making of a contract and prohibits self-dealing
- Basic rule: Officer or employee may not make or participate in making a contract in their official capacity if financially interested
- Recusal is insufficient. Contract is void. Participation may be criminal offense and require resignation.

## Practice Tip:

- Ask yourself-Will I personally gain or benefit from this contract?
- This is a tricky area. Seek advice in advance

# Common Law

- The “common law doctrine against conflicts of interests” seeks to prohibit a division of loyalty, involving the public officer’s duty to the public and his or her personal interests
- Applies when you are making a decision or taking an action where your personal interest is placed above your duty of loyalty to the public
- Commonly seen where public official’s financial interest may be involved, a family member, friend, or close group is involved in action

# Common Law

## Practice Tips:

- A self audit of one's personal interest is required in determining if a conflict exists
- A lot of times, this is mixed with "appearance" issues-- Ask yourself, what would the headlines read?

# Ethics

## Quasi-judicial v. Legislative

### Quasi-judicial

- Involves acting as a trier of fact-like a jury
- Due Process-unbiased decision-maker and make decision evidence presented at hearing
- Ex-parte Contacts-Discouraged. However, disclosure at a minimum.

### Legislative

- Involves setting or recommending policy or adopting resolutions or ordinances
- Can advocate a position

# Gifts

- PRA Prohibition-cannot accept gift(s) totaling more than \$440 in a calendar year
- PRA Recusal-may not participate if received gift(s) totaling \$440 12 months prior to item being considered
- PRA Reporting-must report gift(s) totaling at more than \$50 from a single source
- A “gift” is any payment or other benefit provided to an official that confers a personal benefit for which the official does not provide goods or services of equal or greater value
- A gift includes a rebate or discount in the price of anything unless the rebate or discount is made in the regular course of business to members of the public

# Gifts

## Exceptions to Prohibition and Reporting Requirement:

- Gifts returned within 30 days
- Gifts from close relatives
- Unused tickets
- Informational material
- Personalized plaques
- Hospitality in a friend's home
- Two tickets to political or 501(c)(3) organization's fundraiser

# Gifts

Gifts exempt from Limit Prohibition, but are disclosable:

- Wedding gifts
- Prizes that result from a bona fide competition
- Some gifts of travel within the United States (including travel within California) [Be aware of Cal. Const. Free Transportation Ban]

# Gifts

## Practice Tips:

1. Keep track of items (Gifts) you are given. That way you have information to know: what you were given, by whom you were given, when you were given, and the value (including keeping aggregate total).
2. Be wary of gifts—How will the public see your receipt of the gift? Will it be seen as a bribe?



# Post Employment

## No Lobbying Rules

- GC 87406.3 provides Elected Officials and City Managers are prohibited for a period of one year after leaving office, from representing any other person, for compensation, by appearing before or communicating with their former agency to influence the decision of the agency in an administrative or legislative action
- CVMC 2.01.030(C)(6) provides a similar prohibition for Board and Commission members

## No Influencing Prospective Employment

- GC 87407 provides no public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning prospective employment

# Post Employment

## Practice Tips:

1. Be aware that after leaving office compensated lobbying prohibitions apply.
2. When participating in any matter before you, that you should not be seeking or have future employment relationship with the person or party before you.

# CVMC 2.01 [Code of Ethics]

- In 2013 the City passed CVMC section 2.01 [Code of Ethics]
- It established a code of ethics which was divided into two categories-“Guiding Principles” and “Specific Prohibitions”
  - CVMC 2.01.030(A)- “Guiding Principles”
    - Guiding Principles were meant to be aspirational in nature and do not result in sanctions
      - Set high standards of behavior -Transcend standards required by law
      - Assist City Officials in their decision making process regarding ethical concern
  - CVMC 2.01.030(C)-“Specific Prohibitions”
    - Specific Prohibitions were meant to prohibit specific actions and, if violated, subject the City Official to a finding of misconduct

# CVMC 2.01 Code of Ethics

## Practice Tips:

1. Review the Code of Ethics.
2. If you follow the Guiding Principles, you will be in a position where you do not violate any ethics laws-They focus on ensuring that you do not place your interest above the public's and that you do not personally gain from your position
3. If in doubt, ask for help

# Ethics

“Good advice is something a man gives when he is too old to set a bad example.”

- Françoise De La Rochefoucauld

Ask if you need help