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the 10-21-15 LAFCO hearing.

October 9, 2015

MEMORANDUM

To: PUBLIC POLICY AND ETHICS GROUP PARTICIPANTS
FROM: BEST BEST & KRIEGER, LLP
RE: UPDATES TO THE BROWN ACT AND CONFLICTS OF INTEREST
REQUIREMENTS

Enclosed for your use is a copy of our memo regarding the Ralph M. Brown Act and Conflict of Interest laws. If you need additional copies, please contact Dianna Valdez at 951-826-8252 or at diannamarie.valdez@bbklaw.com.

Thank you.



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MEMORANDUM

TO: PUBLIC OFFICIALS
FROM: BEST BEST & KRIEGER LLP
RE: SUMMARY OF THE BROWN ACT AND
CONFLICT OF INTEREST LAWS

I. OUTLINE OF BROWN ACT

1. INTRODUCTION

Development

The Brown Act (the "Act") was developed as the result of a 1951 San Francisco Chronicle investigation into the plethora of secret meetings despite diverse codes and statutes prohibiting them. The League of California Cities drafted the original act which was later promoted through the legislature by Modesto Assemblyman Ralph M. Brown. The bill was signed into law in 1953.

Purpose

The purpose is to ensure that almost all aspects of the decision-making process of legislative bodies of local agencies be conducted in public, and be open to public scrutiny.

2. BROWN ACT

A. Application of Act

1. The Act applies to "local agencies," generally defined as political subdivisions and districts including, for example, general law and chartered cities, counties, school districts and other special districts.
2. The Act applies to "legislative bodies," generally defined as (a) governing bodies of local agencies, (b) commissions and committees of local agencies, either permanent or temporary, either decision-making or advisory, created by formal action of a legislative body and (c) boards, commissions and committees governing a private entity created by an elected governing body, or receiving



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funds from a local agency and on whose governing body sits a member of the local agency's legislative body.

3. The Act applies to persons elected to serve on a legislative body, even prior to assuming office.
4. The Act applies to "meetings," defined generally as a congregation of a majority of legislative body members to hear or discuss items within that agency's subject matter jurisdiction, or the use of communication or intermediaries employed by a majority of legislative body members. The Act generally does not apply to social events, seminars and educational conferences, or community organized meetings, at which agency business is not discussed by a majority of agency members.
5. The Act does NOT apply to (a) an advisory committee composed solely of less than a quorum of the governing body unless it is a standing committee which has continuing subject matter jurisdiction or a meeting schedule fixed by formal action of the legislative body; (b) mere attendance at a standing committee meeting, if only as an observer; or (c) attendance at open and noticed meetings of other local agencies.

B. Agency Posting and Notice Requirements

1. The Act requires posting an agenda accessible to the public at least seventy-two (72) hours in advance of a regular meeting, with a brief general description (generally need not exceed 20 words) of each item of business to be transacted or discussed in both open and closed session. For special meetings, written notice may be provided by any means at least 24 hours in advance to members of the legislative body and to anyone who has requested notice in writing. The notice must specify the time and place of the meeting and the business to be discussed. Notice may be waived in writing delivered to the secretary before the meeting.
2. No action or discussion is allowed for any item not listed on the agenda (except for brief response to persons exercising public comment rights at meeting).
3. Exceptions:
 - a. Adding an item by 2/3 vote determining an emergency situation exists (work stoppage or crippling disaster impairing the public's health and safety).



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- b. Adding an item by 2/3 vote of those present determining a need to take immediate action and that the need for action came to the attention of the agency subsequent to posting the agenda.
- c. An item was earlier posted pursuant to the seventy-two (72) hour requirement, but the agenda item has been continued to a subsequent meeting within five (5) calendar days of the original meeting.

C. Opportunity for Public to Speak

- 1. Every agenda must provide an opportunity for members of the public to address the body on items of interest to the public, before or during the legislative body's consideration of that item, or concerning items not on the agenda that are within the subject matter jurisdiction of the legislative body (exception: need not allow public to speak if an item was previously considered at a public hearing by a committee composed exclusively of members of the legislative body). The legislative body may adopt regulations limiting the total amount of time allocated for public testimony on particular issues and for each speaker. The legislative body may order the meeting room cleared (except no disruptive news media) of persons willfully interrupting the orderly conduct of the meeting.

3. SOME EXCEPTIONS TO PUBLIC SESSION REQUIREMENTS (Closed Sessions)

- A. Real Property Transactions: The legislative body may go into closed session with its negotiator prior to the purchase, sale, exchange or lease of real property to give instructions to its negotiator regarding the price and terms of payments for purchase, sale, exchange or lease.

Prior to the closed session, the local agency must identify the real property and persons with whom its negotiator may negotiate.

- B. Pending Litigation: The legislative body may discuss in closed session "pending litigation" if:

- 1. There is litigation pending involving the agency; or
- 2. There is "significant exposure to litigation" against the local agency; or
- 3. The local agency has decided or is deciding whether to initiate litigation.

Prior to the closed session, the local agency must state on the agenda or publicly the statutory basis under the Act for discussing pending litigation in closed session.



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- C. "Personnel": The legislative body may go into closed session to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against such employee; unless such employee requests a public session. For complaints or charges brought against an employee, the employee must be given 24 hour notice of the right to have the matter handled in open session. Closed session may NOT be held to discuss the agency's available funds, funding priorities or budget. "Employee" does not include elected officials however, it does include officers and independent contractors who act as officers or employees.
- D. Salaries and Compensation of Employees: The legislative body may discuss in closed session with its designated representatives salaries, salary schedules, or compensation in the form of benefits of its represented and unrepresented employees. These closed sessions can take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees. The same definition of "employee" and prohibition against funding or budget discussion applies as set forth in Section III. C. - "Personnel," above.
- E. Joint Powers Insurance Authorities; Multi-jurisdictional Drug Law Enforcement Agencies: Insurance claims pertaining to tort or workers compensation liability and drug law enforcement criminal investigations may be discussed in closed session by applicable agencies.
- F. Announcement of Action Taken in Closed Sessions: The legislative body must publicly report any action taken in closed session and the vote of every member as follows:
1. Approval of a real estate agreement must be reported at the public meeting during which the closed session is held or, if final approval of the agreement rests subsequently with another party, the local agency must disclose approval of the agreement upon inquiry by any person subsequent to final approval of the agreement by the other party.
 2. Approval to defend litigation, or to seek or refrain from seeking appellate review, or to enter litigation as amicus curiae must be reported in open session at the public meeting during which the closed session is held.
 3. Approval of a settlement of pending litigation must be reported in open session at the public meeting during which the closed session is held, provided that if final approval of settlement rests subsequently with another party, then the disclosure of approval shall be given following inquiry by any person after the settlement becomes final.



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4. Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee shall be reported at the public meeting during which the closed session is held (except that the report of a dismissal or of the non-renewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any).
5. Approval of an agreement concluding labor negotiations must be reported after the agreement is final and has been accepted by the other party.

The legislative body must provide copies of contracts, settlement agreements or other documents that were approved in closed session to any person who submits a written request for them to the legislative body within twenty-four (24) hours of posting of the agenda (and to any person who has made a standing request for all documentation as part of a request for annual notice of meetings).

4. MISCELLANEOUS PROVISIONS

- A. Location of Meetings. All meetings of a legislative body must be held within the boundaries of the territory over which the local agency exercises jurisdiction, subject to limited exceptions. A legislative body may not conduct a meeting in any facility that prohibits admittance of any person on the basis race, religious creed, color, national origin, ancestry, or sex, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase.
- B. Form of Open Deliberation. A legislative body is prohibited from taking any action by secret ballot. A legislative body may use video or audio teleconferencing for the benefit of the public and the legislative body to receive public comment or testimony and to deliberate. If teleconferencing is used, the legislative body must post agendas at all teleconference locations, and each teleconference location must be identified in the notice and the agenda.
- C. Openness of Meetings. A member of the public may not be required to register his/her name or provide other information as a condition to attendance. Any person attending a public meeting has the right to record the proceedings with an audio or video tape recorder or a still or motion picture camera unless the legislative body reasonably finds that such recording cannot continue without noise, illumination or obstruction of view that would constitute a persistent disruption of the proceedings. A legislative body may not prohibit or restrict the broadcast of its proceedings unless it makes similar findings. Any tape or film record of a public meeting made by the local agency is subject to inspection under the California Public Records Act, but may be destroyed thirty (30) days after the taping or recording.



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- D. New or Increased General Tax or Assessment. The Act provides that before adopting a new or increased general tax or assessment, a legislative body must conduct at least one public meeting at which public testimony is permitted, in addition to the noticed public hearing at which the legislative body proposes to enact or increase a general tax or assessment.

5. PENALTIES AND REMEDIES

- A. Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of the Act, with wrongful intent to deprive the public of information to which it is entitled under the Act, is guilty of a misdemeanor.
- B. Violations of the Act may be prevented or stopped by mandamus, injunction or declaratory relief.
- C. Actions by a legislative body which are not in substantial compliance with the open meeting, notice or agenda requirements may be invalidated (exceptions to invalidation generally pertain to actions approving bonds or contracts, or relating to the collection of taxes).
- D. Court costs and reasonable attorney fees are recoverable in an action brought to enforce the Act. The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency.
- E. The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of the Act is null and void. The district attorney or interested person shall make a demand of the legislative body, in writing, to cure or correct the action alleged to have been taken in violation of the Act. Such demand shall be made within 90 days from the date the action was taken unless the action was taken in an open session but in violation of Section 54954.2, in which case the written demand shall be made within 30 days from the date the action was taken. The legislative body must then cure or correct the challenged action within 30 days and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action. During any action seeking a judicial determination pursuant to subdivision (a) if the court determines, pursuant to a showing by the legislative body that an action alleged to have been taken in violation of the Act has been cured or corrected by a subsequent action of the legislative body, the action filed by the District attorney or interested person shall be dismissed with prejudice. It is important to note that the fact that a legislative body takes a subsequent action to cure or correct an action taken, shall not be construed or admissible as evidence of a violation of the Act. (Gov. Code §54960.1)



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II. OUTLINE OF CONFLICT OF INTEREST LAWS

POLITICAL REFORM ACT

- A. The Political Reform Act ("Act") was enacted by initiative measure in 1974. (Government Code § 81000 et seq.)
- B. Legislative Purpose: "Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (§ 81001(b).)
- C. The Fair Political Practices Commission ("FPPC") is the agency primarily charged with the responsibility of advising officials and the public and enforcing the conflict of interest provisions of the Act. The FPPC has adopted regulations interpreting and implementing the Act's provisions. (2 Cal. Code Regs. § 18000 et seq.)
- D. The Basic Prohibition: A public official is prohibited from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official distinguishable from its effect on the public generally. (Gov. Code §§ 87100 and 87103.)
- E. There are four basic questions that a public official should ask in determining whether or not they have a conflict of interest:
 - 1. **Is the official making, participating in, or using his or her "official position" to influence a governmental decision?**
 - 2. **Is it reasonably foreseeable that the decision will affect the public official's economic interest?**
 - 3. **Will the effect of the decision on the official's economic interest be material?**
 - 4. **Will the effect of the decision on the official's economic interest be different than the effect on the public in general?**

If the answer to all of the above questions is "yes," then the official has a conflict of interest and must disqualify himself both from participating in and making the decision.



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F. Components.

1. *Is the official making, participating in, or using his or her "official position" to influence a governmental decision?*

Making a governmental decision includes voting or participating in a decision regarding ordinances, regulations or resolutions; contract awards, purchases or leases; hiring, firing or other personnel actions; or any other decision coming before a public official. It also includes responding to comments, taking part in discussions or making recommendations regarding any of the above topics or decisions is also considered participation in a governmental decision.

2. *Is it reasonably foreseeable that the decision will affect the public official's economic interest?*

An effect on one's economic interest is reasonably foreseeable if the official has a financial interest in a person, property or entity which is a named party in, or the subject of, a governmental decision before that official or the official's agency. A financial interest need not be likely to be considered reasonably foreseeable. (Gov. Code § 18701).

There's probably a conflict if the governmental decision involves any of the following economic interests:

- a. Business Interests. Direct or indirect investments valued at \$2,000 or more. Business entities in which you are a director, officer, partner, trustee, employee or hold any position of management (paid or not paid).
- b. Real Property Interests. Direct or indirect interests in real property valued at \$2,000 or more.
- c. Income Interests. Income, including a community property interest in the income of your spouse, and loans of \$500 or more provided, promised, or received within 12 months prior to the time the decision is made.
- d. Gift Interests. Any donor or intermediary/agent of a gift (or accumulation of gifts) valued at more than \$460 provided or promised within 12 months prior to the time the decision is made.
- e. Personal Finances. Personal expenses, income, assets, or liabilities of you or your immediate family, whether they increase or decrease.



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3. *Will the effect of the decision on the official's economic interest be material?*

In early 2015, the FPPC implemented new materiality standards for financial interests in business entities, real property, sources of income, sources of gifts and personal finances. Under the new standards, a financial effect is not considered material if the financial effect is "nominal, inconsequential, insignificant, or immeasurable." (Reg. 18702.) Certain situations may "trigger" a material effect regarding business entities and real property. The Regulation divides sources of income into two categories: (a) income from sale of goods and services; and (b) income from the sale of personal or real property. The two categories for sources of income distinguish between income an official receives from his or her business or occupation, including salary, and income the official receives from non-business or non-employment activities. The first category suggests a closer, likely on-going relationship with the source of income, while the second category suggests limited or one-time contact with the source.

In general, for business entities, a financial effect is material if a reasonably prudent person would think the financial effect would cause a change in the value of the business. For real property, the effect is material if a reasonable person thinks the decision will impact the market value of the official's property.

A more detailed analysis is required for determining materiality for sources of income, sources of gifts, and personal finances.

4. *Will the effect of the decision on the official's economic interest be different than the effect on the public in general?*

Will the decision cost or earn the official, the official's spouse or dependent children money or affect the official's other economic interests in a way that is different from the general public?

The official does not have a conflict of interest if the effect of the decision on his economic interest is no different from its effect on most other persons (the "public generally"). For example, a decision to impose a tax will affect the official no differently than any other member of the general public. By contrast, a decision concerning a zoning variance for the official's business or home does have an effect on the official that is different from that on the general public and therefore would be considered a conflict of interest for the official. (This exception is very narrowly construed by the FPPC.)

To determine whether the "public generally" exception applies, the following two-step analysis must be made:

STEP 1: Is a "**significant segment**" of the public affected by the governmental decision? If yes, go on to step two.



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STEP 2: Is the effect on the public official “not unique” compared to the effect on the rest of the significant segment? If yes, then the public generally exception applies.

Determining the significant segment is fairly straightforward. The decision only affects a significant segment if it affects at least 25% of any of the following: all businesses or nonprofit entities, all real properties, residential properties or commercial properties, or all individuals within the jurisdiction of the agency.

Determining whether the decision has a “unique effect” is a little trickier. The general idea is that the decision cannot disproportionately impact the public official’s economic interest in comparison to effect on the significant segment of the public generally. There are no bright line rules establishing whether a particular decision will have a unique effect. However, the FPPC regulation provides some examples, which are discussed in more detail below. The gist of the rule is that before a public official can invoke the public generally exception, he or she will have to ask whether the decision will provide a benefit or detriment that differs from the benefit or detriment affecting the rest of the community.

When determining whether there is a unique effect, keep in mind that it is necessary to consider the effect on the public official’s *financial interests*. A financial interest includes an official’s personal finances, as well as interests in real property, business entities, sources of income, and sources of gifts.¹ For example, if a local hotel is a source of income to a public official, the question will be whether the governmental decision has a unique effect *on the hotel*. If so, the official will have to disqualify because the “public generally” exception will not apply.

The Regulations essentially require a public official to ask the following questions before invoking the public generally exception:

- a) Will there be a disproportionate impact on the development potential, use or income producing potential of real property or business interests?
- b) Will there be a disproportionate impact because of proximity to the official’s real property or business interests?
- c) Will there be a disproportionate impact because of the cumulative effect of the official’s multiple interests in similar entities or properties that is substantially greater than the effect on a single interest?

¹ See 2 Cal. Code Regs. §§ 18702.1 – 18702.5.



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- d) Will there be a disproportionate impact because of the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage?

If the answer to any of these questions is "yes," then the public generally exception will not apply. However, these are only meant as examples. Any unique effect, including one that is not listed, will preclude application of the public generally exception.

III. GOVERNMENT CODE SECTION 1090

- A. Government Code Section 1090 prohibits public officers or employees from being financially interested in any contract made by them in their official capacity or by any body or board of which they are members. Government Code Section 1090 also prohibits public officers or employees from being purchasers at any sale or vendor of any purchase made by them in their official capacity.
- B. The purpose behind the prohibitions in Section 1090 is to eliminate opportunities that would prevent officials from exercising loyalty and undivided alliance to the best interests of the public entity of which they are members.
- C. No actual fraud or dishonesty is necessary for a Section 1090 violation.
- D. Even when the governmental official's business turns in the lowest bid, a Section 1090 violation can occur.
- E. Full disclosure will not prevent or cure a Section 1090 violation.
- F. Abstention by the interested public official will not cure a Section 1090 violation.
- G. A Section 1090 violation will occur even if the interested public official abstains from a vote that would approve the contract, sale, or purchase from the public official's business.
- H. The consequences of a violation of Government Code Section 1090 can be criminal *and* civil.
- I. There are exceptions under Government Code Section 1090 (e.g. "remote interests" under Government Code Section 1091 and "non-interests" under Government Code Section 1091.5).



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As always, please do not hesitate to contact our office with any specific questions about the Brown Act, Conflict of Interest laws or Government Code Section 1090, and how it applies to you.