

THE BROWN ACT AND FAIR HEARINGS IN LAND USE DECISIONS



El Dorado County Counsel

Purpose of the Brown Act



- To facilitate public participation in local government
- To curb misuse of the democratic process by secret legislation

To Whom Does the Brown Act Apply?



- 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
- Subject local agencies include a county, city, general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency

What is a Legislative Body?



- The governing body of a local agency or any other local body created by state or federal statute
- A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body (e.g., advisory committees and standing committees)

Exceptions to Legislative Body



- A committee created by and advisory to a single officer of the local agency
- Ad Hoc Committees
 - Composed solely of less than a quorum of the body
 - Advisory only
 - Limited scope and duration
 - No formally-adopted meeting schedule
 - Disband upon completion of assigned task

What is a Meeting?



- Any congregation of a **majority** of the members of a legislative body at the same time and location ... to **hear, discuss, deliberate, or take action** on any item that is within the **subject matter jurisdiction** of the legislative body
- The legislative body does not need to take action in order for it to be considered a meeting

Serial Meetings



- A majority of members of a legislative body shall not, outside of an open and public meeting, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the legislative body.
- Commonly referred to as a serial meeting
 - Daisy Chain (Member A to Member B and Member B to Member C)
 - Hub and Spoke (Member A to Member B and Member A to Member C)

Permissible Gatherings



- Individual board member discussions with constituents, staff, etc.
- Attending a purely social or ceremonial occasion
- Attending a conference, provided the conference is not by invitation only (must be open to the public, who may be required to pay to attend)

Permissible Gatherings (cont.)



- Attending an open and publicized meeting organized by another person or organization to address a topic of local community concern
- Attending a properly noticed public meeting of another legislative body of the same agency (e.g., Planning Commission attending BOS meeting) or of a legislative body of another agency (e.g., BOS attending a city council meeting)
- Attending a public meeting of a standing committee of the body, provided the board members creating a quorum of the full body attend only as observers

Rules for Meetings



- Must be open and public
- Must comply with the Americans with Disabilities Act
- Cannot require a member of the public to register his or her name or provide other information as a condition to attendance (an attendance list must indicate that signing is voluntary)
- The public has the right to record and broadcast the meeting
- Teleconferencing permitted subject to certain requirements

Rules for Meetings



- **Regular Meetings (Gov. Code §§ 54954, 54954.2)**
 - Time and place specified in an ordinance, resolution, or bylaws (advisory or standing committees can meet “as needed”)
 - Post the agenda 72 hours in advance
 - Brief general description of each item of business
 - Separate public comment item
 - If requested, must be made available in alternative format for disabled person and describe procedure for accommodations

Rules for Meetings



- **Special Meetings (Gov. Code §54956)**
 - Can be called at anytime by the chair or majority of body
 - Post the agenda 24 hours in advance
 - Items cannot be added to the agenda at the meeting
 - Separate public comment item not required
- **Emergency Meeting (Gov. Code §54956.5)**
 - Only when prompt action is necessary due to disruption or threatened disruption of public facilities
 - 1 hour notice unless dire emergency
 - Only allowable closed session is for public security
 - Special rules for reports and minutes

Items Not on the Agenda



- No discussion or decision on items not on the posted agenda
- Members or staff may respond briefly to questions posed by the public
- Members may ask staff a question, make a brief announcement, or make a brief report on his/her own activities
- Members may ask staff to report back on an item at a later meeting or place a matter on a future agenda
- Additional items can be added only in certain circumstances

Public Comment



- Every regular meeting agenda must allow the public to speak on any item of interest within the subject area of the legislative body
- Public must be allowed to speak on specific item of business before or during the consideration of the item
- May adopt reasonable regulations for public comment (e.g. time limits)
- May not prohibit criticism of policies, procedures, programs or services, or of the acts or omissions of the legislative body

Voting



- No action may be taken by secret ballot
- The legislative body shall publicly report any action taken and the vote or abstention of each member present
- Votes taken during meetings held via teleconference must be by roll call

Closed Sessions



- **Narrow exceptions to the open meeting rule, such as for the following:**
 - Personnel (§ 54957(b))
 - Labor negotiations (§ 54957.6)
 - Pending litigation (§ 54956.9)
 - Real property negotiations (§ 54956.8)
 - Public security (§ 54957(a))
- **Discussion must stay within the parameters of the exception**
- **Discussion is confidential**

Brown Act Violations



- Any individual or the DA may file a civil lawsuit for injunctive relief or to void an action taken in violation of the Brown Act
 - Attorney's fees are available to plaintiff
- Any member who attends a meeting where action is taken in violation of the Brown Act where the member intends to deprive the public of information the members knows or should know the public is entitled to, is guilty of a misdemeanor.

Procedural Due Process



- Procedural Due Process is a constitutional right derived from the Fifth Amendment and extended to state governments through the Fourteenth Amendment.
 - “[N]or shall any State deprive persons of life, liberty, or property, without due process of law.”
- Civil Code section 1094.5 provides for a petition for a writ of mandate to challenge whether a final administrative decision was the result of a fair trial or there was a prejudicial abuse of discretion.
- What constitutes a “fair hearing” and “due process” has been developed through judicial decisions. There are no “bright-line” rules or clear statutory guidelines.

Adjudicatory vs. Legislative Decisions



- Due process is triggered by **adjudicatory or quasi-adjudicatory** decisions.
 - Quasi-adjudicatory decisions involve the application of facts to a particular case.
 - Body is acting as the fact finder in making a decision.
 - Examples include conditional use permits, variances, design review permits, and subdivision and parcel maps.
- Due process is not triggered by **legislative decisions**.
 - Legislative decisions include the adoption of rules of general application on the basis of broad public policy.
 - Zone amendments are generally legislative acts, but some courts have held that zone amendments trigger constitutional due process when the amendments “exceptionally affected” a small number of people.

General Standard



- *Core requirement:* Notice and an opportunity to be heard before a neutral decision-maker.
- Decision-maker is not neutral if has:
 - **(1) A conflict of interest**
 - Private interests influencing the public decision
 - **(2) Pre-judged the specific facts of a case or made up mind in advance of the hearing**
 - Pre-judging prevents the necessary weighing of evidence presented at the hearing
 - **(3) Actual bias or an unacceptable probability of actual bias against or in favor of any party**
 - Standard is “framed in terms of *probabilities*, not certainties”
 - Proof of actual bias is not required
 - Bias will not be inferred, but must be established with concrete facts

Knowledge Before a Hearing



- Serving as a neutral decision-maker does not require that the official is unfamiliar with the project before the hearing.
 - Especially in rural communities, decision-makers will usually know the parties and details of the project.
 - Will also have reviewed arguments in favor and against the project before the hearing through public comment.
- Not precluded from talking to an applicant or appellant or seeking information in advance of a hearing.
 - If willing to meet with the applicant, then should also be willing to meet with project opponents and vice versa.
 - Alternatively, may decide to refrain from ex parte communications before an adjudicatory hearing, but this approach should be applied consistently to anyone regardless of their position or role.

Ex Parte Communications



- Ex parte communications include conversations, site-visits, e-mails, text messages, independent investigations, and pre-existing knowledge or training.
 - Do not include communications with County staff.
- To ensure a fair hearing, ex parte communications and material information obtained that is not in the record must be disclosed at the hearing.
 - Disclosures should be made before public comment so that the applicant, appellant, or public have the opportunity to ask questions or provide information in response to the disclosures.
 - If public comment is closed but a project is continued for deliberations, decision-maker should avoid any further ex parte communications.

City of Fairfield v. Superior Court of Solano



- City council denied application for a permit for a planned unit retail center.
- During election, two city council members had publicly stated opposition to the proposed retail center and one spoke against the project at the Planning Commission.
- The California Supreme Court did not find bias based on the statements made before the hearing.
- “A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance.”
- Campaign statements “do not disqualify the candidate from voting on matters which come before him after his election.”

Nasha LLC v. City of Los Angeles



- Director of Planning approved residential project that was appealed to the Planning Commission.
- One Commissioner served as president of a neighboring homeowners association, which alone would not have required recusal. When the homeowners association considered the project, the Commissioner introduced the appellant, but then left the room.
- At hearing, Commissioner disclosed that he served as president of the association and that the association had included information about the project in its monthly newsletter. He stated at the hearing that he believed he could make a fair and impartial decision.

Nasha LLC v. City of Los Angeles



Court found actual bias based on:

- Anonymously authoring article in association newsletter stating the project would threaten a “crucial” wildlife corridor.
 - Court noted that he failed to disclose that he authored the article and that the article took a stance against the project.
- Failure to disclose ex parte communication with the appellant, which the court concluded occurred based on the Commissioner having introduced the appellant at the association meeting.
- Statement against project drafted in advance of hearing.
 - Court described as “extraordinarily well-organized, thoughtful and well-researched presentation” advocating denial.
 - Because remarks “had been written out beforehand,” court gave no weight to what it called a “self-serving comment at the hearing” that the Commissioner had “no bias in this situation.”

Petrovich Development Co. v. City of Sacramento



- Planning Commission voted 8-3 to approve conditional use permit for a gas station in retail development and decision was appealed to City Council, which granted the appeal and denied the project.
- Court found bias was not established based on:
 - Councilmember's membership in neighborhood association that had opposed the project.
 - Prior statement that a gas station did not fit in the development as originally proposed.
 - Councilmember lived in a residential neighborhood adjacent to the proposed gas station, but there was no evidence that his particular residence would be uniquely impacted.

Petrovich Development Co. v. City of Sacramento



- Court found the Councilmember “crossed the line into advocacy against the project,” had a “prehearing commitment to achieving that outcome,” and had engaged in “behind-the-scenes-advocacy” against the project based on:
 - Text messages “counting—if not securing—votes” against the project.
 - Court interpreted denial that he had spoken to “all” of his colleagues about votes as an admission that he had spoken to “less than all.”
 - Updating the mayor on the “vote count.”
 - Preparing “Talking Points” in advance of hearing that were a “compilation of facts that amounted to a presentation against the gas station.”
 - E-mailing his “Talking Points” to the mayor and the mayor’s advisor with a suggestion for the sequence of the hearing, including who would make and second the motion.
 - Texting with appellant before the hearing and offering suggestions.
 - Making the motion to reverse Planning Commission decision.

Procedural Due Process Remedies



- Failure to provide a fair hearing invalidates the decision and generally requires reconsideration before an impartial body.
 - Generally, requires recusal of the biased decision-maker.
- Challenge typically brought as a petition for writ of mandate under Code of Civil Procedure section 1094.5.
 - Attorney's fees are available to petitioner.
- Although generally not utilized in the land use context, denial of procedural due process can also be challenged in a civil action under 42 U.S.C. section 1983.
 - Applications for land use entitlements are often insufficient to give rise to a property interest protected under the Constitution.

Political Reform Act of 1974

Government Code sections 81000 to 91014



- “No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”
- Fair Political Practices Commission (“FPPC”) enacts regulations addressing financial conflicts of interest.
- Penalties for violations include fines and criminal liability.

Financial Interests



- **Business Entity**
 - Position of leadership
- **Investments**
 - Business: \$2,000 or more
 - Property: 10% or more ownership
- **Real Property**
 - \$2,000 or more
- **Income**
 - \$500 or more over 12 months, including income of spouse
 - Individual clients in a business are sources of income if paid \$500 or more
- **Donor/Gifts**
 - \$500 or more over 12 months
- **Personal Finances**
 - Monetary impact of \$250 or more
- **Self-Dealing**
 - Contracting with an entity in which the official has a financial interest

Real Property



- **Ownership interest, however small, is enough**
- **Distance**
 - **Within 500 feet of project**
 - Assumed to be material and disqualified
 - Cannot participate unless there is clear and convincing evidence that the decision will not have any measurable impact
 - **Between 500 and 1,000 feet**
 - May not participate in the decision if would change the property's (1) development potential; (2) income producing potential; (3) highest and best use; (4) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or (5) market value
 - **1,000 feet or more**
 - Presumed not to be material, but may be rebutted

Disclosure and Recusal Required



- Officials required to disclose financial interest and disqualify themselves from participating in the decision.
- Effective June 19, 2020, FPPC amended regulations regarding disclosure and recusal requirements.
 - Oral disclosure must be made “immediately prior” to consideration of item on agenda.
 - Disclosure must identify each type of financial interest and include particular information, such as the name of the business and position held, address or APN of real property, or name of the source of a gift.
 - Partial absence from meeting does not excuse disclosure requirement.

Unsure About a Potential Conflict?



- Recommended to obtain a formal advice letter from FPPC.
 - FPPC formal advice letter can be "offered as evidence of good faith by the requester in an FPPC enforcement proceeding if all material facts were truthfully disclosed to the FPPC and the requester relied on the opinion or advice."
- Recommendations of County Counsel regarding financial conflicts of interest have limitations.
 - Because the attorney-client privilege extends to the County as client, attorney-client privilege may not extend to information about official's personal financial interests.
 - Attorney-client privilege would exist between the official and the official's private counsel.
 - County Counsel legal opinion that there is no financial conflict would not insulate official from liability if advice was mistaken.



Questions?