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MEMORANDUM OF LAW

DATE: October 31, 2007

TO: Janice L. Weinrick, Deputy Executive Director, Redevelopment Agency,
and Director, Redevelopment Division, Department of City Planning and
Community Investment

FROM: City Attorney

SUBJECT: Application of the Ralph M. Brown Act to Meetings of the Affordable
Housing Collaborative Executive Loan Committee

INTRODUCTION

In 2002, the City Council and Redevelopment Agency approved a process that would create a central pool of public funds to which developers could apply to finance affordable housing units in the City of San Diego. The Affordable Housing Collaborative Executive Loan Committee [ELC] was created as part of that process. The ELC reviews projects seeking access to those funds and makes recommendations to the Redevelopment Agency and City Council as to which projects should or should not receive funding.

The ELC has initiated revisions to its policies and the operating procedures for its meetings. The Redevelopment Division of the City Planning and Community Investment Department, a member of the ELC, has asked our Office to determine whether the meetings of the ELC are governed by the open meeting provisions of the Ralph M. Brown Act [Act].

QUESTIONS PRESENTED

Does the Act govern the meetings of the Affordable Housing Collaborative Executive Loan Committee [ELC]?

SHORT ANSWERS

Yes. The ELC of the Affordable Housing Collaborative is an advisory committee created by the San Diego Redevelopment Agency and the City Council. It meets the legal definition of a legislative body under the Act. Accordingly, the meetings of the ELC Committee are subject to the requirements of the Act.

BACKGROUND

In November 2001, the City Council Committee on Land Use and Housing directed that four major City entities with responsibilities for affordable housing development meet to develop a citywide affordable housing strategy. The entities were the San Diego Housing Commission, the Centre City Development Corporation [CCDC], the Southeast Development Corporation [SEDC], and the City department providing redevelopment services to the San Diego Redevelopment Agency. These entities jointly authored a status report dated April 17, 2002, reviewing the City's affordable housing production from 1992 to 2002. The same entities completed a proposal for a comprehensive Citywide Affordable Housing Strategy in a collaborative report dated July 31, 2002 that was addressed to the Mayor and City Council, the City Redevelopment Agency, and the City Housing Authority. *See* Report No. CMR 02-164, RA 02-17 and HAR 02-008.

California redevelopment law requires not less than 20 percent of tax increment revenues received by a redevelopment agency be set aside to provide housing for low to moderate income individuals. Cal. Health & Saf. Code §§ 33670 and 33334.2. The July 2002 report recommended that a substantial amount (approximately \$55 million) of these public revenues, then under the separate control of authoring entities, be pooled and managed by a citywide strategy for affordable housing using a joint Notice of Funding Availability [NOFA] process. Attachment 2 to the July 2002 report outlines the process by which developers could seek access to this pool of funds. *See* Attachment A to this report. The outline shows the ELC as the final step in the application and review process for a project seeking funding. The ELC determines whether to recommend funding for the project from the finance pool and provides its assessment to the Redevelopment Agency when it considers the project for approval. The outline shows the ELC as having four members: one board member each from CCDC and SEDC; one Housing Commissioner; and the Assistant City Manager in charge of the City redevelopment department.¹

By resolution (R-03525, August 6, 2002), the Redevelopment Agency agreed in concept with the proposal in the July 2002 report and directed that the staffs of CCDC, SEDC and the

¹ In 2002, the City Manager acted as the Executive Director of the Redevelopment Agency; the City Council, then including the Mayor, elected the civilian board members of SEDC and CCDC; and the Mayor, with Council approval, appointed the housing commissioners. Currently, the Mayor or designee acts as the Executive Director of the Redevelopment Agency, and the Mayor appoints, with Council approval, the civilian board members of SEDC, CCDC and the housing commissioners.

City Department work with the City and the Housing Commission to prepare a joint NOFA using the process in the report, and to establish implementation of the pooled financing from the collaborative entities in conjunction with the NOFA process.² By January 2003, the combined resources were in place and the Redevelopment Agency authorized the collaborative to seek proposals from developers for new affordable housing units in the City. *See* Redevelopment Agency Resolution R-03587 (January 28, 2003).

In 2006, when the initial \$55 million dollars in the pool was close to exhaustion, the Redevelopment Agency authorized continuing the operation of the revenue pool, now called the Affordable Housing Opportunity Fund, and seeking a line of credit to provide it with an additional \$34 million dollars. *See* Redevelopment Agency Resolutions R-04068 and R-04069 (August 4, 2006).

Since its inception in 2002, the ELC has met on a regular basis to hear developer proposals and to decide whether to recommend the project to the Redevelopment Agency to receive money from this pool of public funds. Its recommendation to fund or not to fund a project is incorporated into the report the Redevelopment Agency considers in making its final decision on the project.³

ANALYSIS

I. The Ralph M. Brown Act Applies to Meetings of All “Legislative Bodies” of Local Agencies.

The Ralph M. Brown Act was enacted in 1953. Cal. Gov’t Code §§ 54950 – 54963.⁴ The Act is California’s “Open Meeting Law.” Its purpose is to assist the public’s participation in local governmental decisions. To do that, it establishes rules to ensure the actions and deliberations of public bodies, including certain advisory bodies, occur openly with public access and input.

The Act requires that “[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency” § 54953(a). The Act “serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies.” *Epstein v. Hollywood Entertainment District II*, 87 Cal. App. 4th 862, 868 (2001) [*Epstein*] (citation omitted). Established case law and local and state constitutional enactments in 2004 require the Act be interpreted liberally in favor of openness in conducting public business. *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 917

² The City Council acted in similar fashion to the Redevelopment Agency by Resolution R-296983, also adopted August 6, 2002.

³ When City Council approval of a project is also required, the ELC recommendation is considered by that body.

⁴ Future section references are to the California Government Code unless indicated otherwise.

(2002); Cal. Const. art. I, § 3(b)(2); San Diego Charter § 216.1(b)(2).

The City Council and the Redevelopment Agency are legislative bodies of local agencies whose meetings are governed by the Act. §§ 54951, 54952(a); *Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95, 99 (1985). Standing committees of a legislative body, such as the City Council Committee on Land Use and Housing, are also legislative bodies under the Act. § 54952(b).

II. The ELC is an Advisory Committee and Legislative Body Under the Act.

In addition to the legislative bodies described above which are subject to the Act, *any* legislative body may create advisory committees that are also governed by the Act, so long as those committees meet the legal definition found in section 54952(b). That section defines such legislative bodies as any “commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or *advisory, created* by charter, ordinance, *resolution, or formal action* of a legislative body.” § 54952(b) (emphasis added.)

The purpose of the ELC is to review projects and provide recommendations to other legislative bodies, namely, the Redevelopment Agency and City Council, as to whether those projects should or should not receive funds from the Affordable Housing Opportunity Fund. The ELC is plainly an advisory committee. The legal question is whether this advisory committee was “created” by one or more legislative bodies by resolution or some other formal action.

A. The Legal Meaning of “Created” Under the Act.

Well-established precedent gives a very broad legal definition to the word “created” as it is used in section 54952 of the Act. *Frazer v. Dixon Unified School District*, 18 Cal. App. 4th 781, 782 (1993), a case interpreting a predecessor statute to section 54952, section 54952.3,⁵ is instructive. The question was whether certain school committees, established by a school superintendent under the general authority of a school board policy, were advisory committees subject to the open meeting provisions of the Act. Members of the public complained they were excluded from certain deliberative meetings of review committees that had been appointed by the superintendent of schools in accord with a general school board policy. Committee members included both employees of the school district and parents. Committee recommendations went to the superintendent and through him to the Board for final action. *Id.* at 785-787, n. 6, 792-793.

Like current section 54952(b), section 54952.3 then required that an advisory committee be “created by charter, ordinance, resolution, or by any similar formal action of a legislative body ... of a local agency.” *Id.* at 792. The court recognized that legislative bodies will often “establish ‘advisory committees’ to assist with ‘examination of facts and data,’ and that the mechanisms by which such advisory bodies are created will be equally varied. We must give that section a broad construction to prevent evasion.” *Id.* at 792 (citation omitted). The court

⁵ Section 54952.3 was repealed in 1994.

focused not on who appointed members of the committees, which it found “irrelevant,” but “on the authority under which the advisory committee was created.” *Id.* at 792, and n.6. That authority, the court found, derived from the Board, and the creation of the committees pursuant to the Board’s general policy was sufficient to constitute a “formal action” within the meaning of the statute. Thus, the meetings of the committees were subject to the Act. *Id.* at 792-793.

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

In holding that the meetings of this corporation were subject to the Act, the court accepted the common definition of “to create” as meaning “to bring into existence.” *Id.* at 295. Significantly though, the court did not require the legislative body’s participation in the creation process to be exclusive. The City Council needed only to play a role or be involved in bringing the corporation into existence, along with the Harbor Commission, to “create” the corporation under the Act. *Id.* at 295, 296. The court found the City Council had played such a role because the private corporation could not have been created “without the express or implied approval of the City Council.” Although the Harbor Department had created the corporation with the Commission’s approval, it was the City Council that had overall authority over the Harbor Commission. The Council had also acted to approve the Department’s contract with the corporation and to approve an extended lease of City land to be used by the corporation. This was sufficient for the court to hold the corporation was “created” by the City Council and subject to the Act.

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

Reviewing this authority, it is apparent that any legislative body under the Act may create an advisory committee that is a legislative body under section 54952(b) if the first body by some formal action or resolution is the general authority source for the committee; if it “plays a role” in the creation of the advisory body; if it is “involved in” bringing the advisory body into

existence; or if it creates the *raison d'être* for the advisory committee.

B. Resolution or Formal Action.

Section 54952(b) does require the role played by a legislative body in the creation of an advisory body to be reflected in some action. The action may be by “resolution” or some other “formal” action, and as we have seen, that action may be quite indirect.

In this case, a standing committee of the City Council directed separate City entities to develop a citywide strategy to streamline the processes and to address affordable housing issues. That direction resulted in the July 31, 2002 collaborative report to the Redevelopment Agency and the City Council, proposing the pooling of public funds and creation of the NOFA process. The report outlined the ELC’s role in the application process, that its recommendations would be made to the Redevelopment Agency, and specified the composition of the committee. The City Council and the Redevelopment Agency, each by separate resolution in 2002, approved the pooling of those funds and the process described in the report, including the composition and role of the ELC. Once the finance pool existed, the Redevelopment Agency authorized the start of the NOFA process in 2003 and in 2006 sought continued funding of these pooled resources through new lines of credit.

Based on the legal precedent, and the plain language of the statutes involved, the Redevelopment Agency and the City Council did play a sufficient role in the creation of the ELC by adopting their respective 2002 resolutions to make the ELC an advisory committee that is a legislative body under section 54952(b) of the Act. Accordingly, all meetings of the ELC are subject to the Act’s requirements.⁶

CONCLUSION

The ELC provides valuable advice to the City of San Diego Redevelopment Agency and City Council as to whether certain City development projects should or should not receive public funding from the Redevelopment Agency’s Affordable Housing Opportunity’s Fund. This Office concludes that it is an advisory committee created by the Redevelopment Agency and the City Council. As such, its meetings are governed by the Ralph M. Brown Act.

The ELC already conducts its meetings openly, and should continue its efforts to formalize its operating procedures and policies. The ELC may wish to review the recent revision

⁶ “Meetings” subject to the Act’s open meeting rules are defined as “any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.” § 54952.2(a).

to Council Policy 600-24, which incorporates the Act's provisions for meetings of recognized Community Planning groups. In addition, the ELC should review the Attorney General's excellent free manual "The Brown Act: Open Meetings For Legislative Bodies (2003)." It is available at the website <http://ag.ca.gov/publications/index.php#opengovernment>.

Because the ELC was created by and serves the City Council and Redevelopment Agency, the committee's proposed revisions to its procedures and policies need to be approved by those bodies to ensure they are consistent with Council and Agency priorities.

MICHAEL J. AGUIRRE, City Attorney

By
City Attorney

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Attachment

cc: Michelle St. Bernard, Project Manager, Affordable Housing