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OPINION NUMBER 2012-1

DATE: March 22, 2012

SUBJECT: Application of the Ralph M. Brown Act and the California Public Records Act to the Activities of the Balboa Park Conservancy

REQUESTED BY: Gerry Braun, Director of Special Projects, Office of the Mayor

PREPARED BY: City Attorney

INTRODUCTION

The Balboa Park Conservancy is a private nonprofit corporation formed expressly to benefit Balboa Park through fundraising, promoting, and implementing projects to restore and improve Balboa Park.¹ The Conservancy was formed in response to studies conducted over several years that recommended the formation of a nonprofit entity to assist the City with governance, fundraising, and management of Balboa Park.²

At this time, the City and the Conservancy anticipate entering into an agreement to define the Conservancy's role and its relationship with the City (the Proposed Agreement). You have asked this Office to determine whether, once the Conservancy assumes its new role as described in the Proposed Agreement, the Conservancy must comply with the provisions of the Ralph M. Brown Act (Brown Act) and the California Public Records Act (PRA).

¹ The Conservancy's Bylaws state: "The specific purpose of this corporation is to promote, support, fund, implement, facilitate, manage and oversee projects to restore, preserve, maintain and improve the park land, buildings and infrastructure of Balboa Park in the City of San Diego; and to support the management, governance and funding of Balboa Park in the City of San Diego."

² "Keeping Balboa Park Magnificent in its Second Century: A Look at Management, Fundraising, and Private Partnerships at Five Other Major U.S. City Parks," Center for City Park Excellence, Trust for Public Land (Aug. 2006); "The Soul of San Diego: Keeping Balboa Park Magnificent in its Second Century," Center for City Park Excellence, Trust for Public Land (Jan. 2008); "The Future of Balboa Park: Funding, Management and Governance," Balboa Park Committee (Dec. 18, 2008); "The Future of Balboa Park: Keeping Balboa Park Magnificent in its Second Century (Regarding the Formation of a New Public Benefit Non-Profit Corporation & the Creation of a Public Private Partnership with the City of San Diego to Assist with Funding, Management, and Governance of Balboa Park)," Balboa Park Task Force (Apr. 19, 2010).

QUESTIONS PRESENTED

1. If the Balboa Park Conservancy enters into the Proposed Agreement with the City, will the Brown Act apply to the Balboa Park Conservancy?
2. Will the California Public Records Act apply to the Balboa Park Conservancy?

SHORT ANSWERS

1. Yes. The Conservancy was created after a lengthy public process for the purpose of assisting the City in funding, governing, and managing Balboa Park. The Proposed Agreement will create a special relationship between the City and the Conservancy, provide the Conservancy with the purpose for which it was formed, and bring the Conservancy within the definition of a “legislative body” covered by the Brown Act. Accordingly, based upon existing caselaw requiring a broad interpretation of the provisions of the Brown Act to protect the public’s interest in open government, it is consistent with the law and the City’s intent for the Conservancy to have an important role in the Park’s future, to apply the open meeting rules of the Brown Act to the board of the Balboa Park Conservancy.
2. Yes. If the board of the Balboa Park Conservancy is a “legislative body” under section 54952(c) of the Brown Act, then the Conservancy is also a “local agency” covered by the Public Records Act.

ANALYSIS

I. THE RALPH M. BROWN ACT APPLIES TO MEETINGS OF ALL “LEGISLATIVE BODIES” OF LOCAL AGENCIES

Enacted in 1953, the Ralph M. Brown Act is California’s “Open Meeting Law.” Cal. Gov’t Code §§ 54950 – 54963.³ 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 Brown 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 Brown 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 Business Improvement District*, 87 Cal. App. 4th 862, 868 (2001).

Established case law requires that the Brown Act be interpreted liberally in favor of openness in conducting public business. *Shapiro v. San Diego City Council*, 96 Cal. App. 4th

³ Section references are to the California Government Code unless indicated otherwise.

904, 917 (2002). The Brown Act applies to a wide variety of boards, councils, commissions, committees and other bodies that govern public agencies, as well as the advisory committees established to assist them, and should be construed broadly to prevent evasion. *Frazer v. Dixon Unified School District*, 18 Cal. App. 4th 781, 792-793 (1993). Moreover, in 2004, voters enacted changes to the California Constitution and the City Charter explicitly requiring a broad reading of public access laws like the Brown Act. Cal. Const. art. I, § 3(b)(2) and San Diego Charter § 216.1(b)(2) (both stating, “[a] statute . . . shall be broadly construed if it furthers the people's right of access . . .”).

A. Definition of Legislative Body

At first glance, the Brown Act’s reference to “the legislative body of a local agency” brings to mind those decision-making bodies made up of elected or appointed officials that are most often in the public eye such as, for example, the City Council or the Board of the Housing Authority. The definition of “legislative body,” however, is much broader and in the words of the court in *Epstein*, encompasses “all phases of local government decision-making.” While the City Council and the board of the Housing Authority are covered in part (a) of the three-part definition set forth in section 54952 defining “legislative body” as “the governing body of a local agency,” parts (b) and (c) continue on to cover a multitude of commissions, committees, and boards involved in the governing process.

Under section 54952(b), “legislative body” includes all commissions, committees, boards, and other bodies that were “created by” formal action of a legislative body, “whether permanent or temporary, decision-making or advisory.”⁴ This means that a committee formed by a committee may be subject to the Brown Act even if it is purely advisory in scope and regardless of whether it receives monetary support from the City. *See City Att’y MOL No. 2006-26 (Oct. 27, 2006)* (Brown Act applies to Community Planning Groups and Community Planning Committee as advisory groups). For the City, the list of “legislative bodies” under section 54952(b) of the Brown Act is extensive and includes bodies established by state legislation, the City Charter, and ordinance or resolution of the City Council.

The third part of the definition of “legislative body” brings the boards of certain private corporations under the Brown Act umbrella. Under this part, “legislative body” includes the board of a private corporation, limited liability company, or other entity that meets either of the following criteria of section 54952(c)(1):

⁴ Section 54952(a) reads in full:

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. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

- (A) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or other entity; or
- (B) Receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency.

For the City, this includes, for example, the boards of the San Diego Convention Center Corporation, the Centre City Development Corporation, the Southeastern Economic Development Corporation, and the San Diego Data Processing Corporation.

II. IS THE BOARD OF THE BALBOA PARK CONSERVANCY A LEGISLATIVE BODY UNDER THE BROWN ACT?

The board of the Balboa Park Conservancy, as the board of a private corporation, is subject to the Brown Act only if it fits within the definition of “legislative body” found in section 54952(c)(1)(A) or (B), set forth above.

In this instance, part (B) does not apply. The Conservancy will not, as part of entering into the proposed agreement with the City, receive funds from the City. Moreover, there is no member of the City Council currently serving on the Conservancy’s board, and the proposed agreement does not contemplate or provide for the appointment of a Council member to the Conservancy’s board. While the proposed agreement provides for the inclusion of the Mayor on the Conservancy’s Board, the Mayor is not “a member of the legislative body of the local agency,” and inclusion of the Mayor does not meet that criteria.

Critical to this analysis, then, are the criteria set forth in subpart (A): whether the Conservancy was *created* by the *elected* legislative body to exercise authority *lawfully delegated* to the Conservancy by the City Council. Unlike other committees and boards, for the board of a corporation to be considered a legislative body, the corporation must be “created by” the City Council for the purpose of exercising authority being delegated to it by the City Council.

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

California courts give a very broad legal definition to the term “created by” as used both in section 54952(b) (“created by charter, ordinance, resolution, or formal action of a legislative body”) and 54952(c)(1)(A) (“created by the elected legislative body in order to exercise authority..”). *Frazer*, 18 Cal. App. 4th 781; *International Longshoremen’s & Warehousemen’s Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287 (1999); *Epstein*, 87 Cal. App. 4th 862; 85 Op. Cal. Atty. Gen. 55 (2002).

Both *International Longshoremen’s* and *Epstein* were decided under section 54952(c)(1)(A)’s language: “created by the elected legislative body in order to exercise

authority.” In both cases, the question before the court was whether a private corporation was “created by” the city council under section 54952(c)(1)(A) such that the Brown Act would apply to meetings of the corporation’s board. In both cases, the Court of Appeal broadly defined the term “created by” to find that the Brown Act applied to the meetings of the corporate board.

International Longshoremen’s arose out of a plan to develop a new coal terminal in the City of Los Angeles. Thirty-four private companies and the City’s Harbor Department negotiated a shareholders’ agreement that called for formation of a for-profit corporation, the Los Angeles Export Terminal, Inc. (LAXT), to design, construct, and operate the terminal. The city council approved the shareholder agreement, LAXT was formed, and the Harbor Commission approved a lease of harbor property to LAXT. 69 Cal. App. 4th at 290-291.

In holding that the meetings of LAXT’s board were subject to the Brown Act, the court started with 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. Rather, the city council need only “play a role” or be involved in bringing the corporation into existence, to “create” the corporation under the Brown Act. *Id.* at 295-296. The court found the city council had played such a role because the city’s charter gave the city council ultimate authority over the Harbor Commission and the private corporation could not have been created “without the express or implied approval of the City Council.” *Id.* at 296. Even though LAXT was formed by the collective action of its shareholders, including the Harbor Department, that action would not have been taken without the city council’s approval of the shareholder agreement and the Harbor Commission’s approval of the lease. *Id.* at 295 n.2. This was sufficient for the court to hold the corporation was “created by” the city council and subject to the Brown Act: “Thus, the City Council *was involved* in bringing LAXT into existence.” *Id.* at 296 (emphasis added).

The court in *Epstein* followed *International Longshoremen’s* in using a broad definition of “created by” to extend the Brown Act to a private corporation property owners association formed by a group of private citizens. In that case, the private citizens group formed the corporation after the city council adopted an ordinance establishing a business improvement district (BID). The management plan adopted by the ordinance referenced governance of the BID programs by a not yet created nonprofit association. 87 Cal. App. 4th 862, 865. The citizens group formed the Property Owners Association (POA) as a private nonprofit corporation for the same purpose as the BID, *i.e.*, to develop and restore public areas in the area of the BID to improve tourism and business. *Id.* Thereafter, the city council established a second BID, and in doing so, specifically designated the POA to manage and operate the BID using the funds raised by the city through assessments. *Id.* at 866.

The court found that the city council “created” the corporation within the legal meaning of section 54952(c)(1)(A) because the city “played a role in bringing” the POA “into existence” when the city established the BID and provided that it would be governed by a nonprofit association. *Id.* at 870-871. In doing so, the court rejected the argument of the POA that it was created by private citizens and not the city; the POA was not a preexisting corporation that “just ‘happened’ to be available to administer” the BID funds. *Id.* at 871 (*citing International*

Longshoremen's). Rather, the POA was formed and structured for the purpose of taking over the BID's administrative functions. *Id.* at 871. An operating BID "was the *raison d'être* for the POA; by giving the BID the legal breath of life, the City breathed life into the POA as well." *Id.* at 873.

The California Attorney General employed the same meaning of "created by" in finding a nonprofit corporation that had an agreement with the city to run its cable television station was "created by" the city council. 85 Op. Cal. Att'y Gen. 55 (2002). In that instance, the city "played a role in bringing the corporation into existence" by granting the corporation a franchise, requiring that the corporation set aside an educational channel, designating the corporation to operate the channel, and indirectly providing \$57,000 in capitalization funds to the corporation. *Id.* at 58.

In each of these cases finding that the private corporation was "created by" the city council, the city council defined a role for a private corporation to play in some aspect of the city's business (*e.g.*, to design, build, and operate a new port facility or to manage a BID) and a private corporation was then formed whose stated purpose encompassed the public agency's needs. In each case, in determining whether the city council "played a role in bringing the corporation into existence," the court placed little stock in who actually formed or was a member of the corporation, and instead looked to the purpose for which the corporation was formed.

B. Lawful Delegation of Authority

Following from and intertwined with the question of whether the corporation was "created by" the elected legislative body is the second criteria of section 54952(c)(1)(A), whether the corporation was created to exercise some authority lawfully delegated to it by the legislative body. A public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so as to protect the public interest. *International Longshoremen's*, 69 Cal. App. 4th 287, 297-298; *Epstein*, 87 Cal. App. 4th 862, 873. A corporation to which such administrative functions are delegated must comply with the same laws and regulations as the public entity that is delegating its authority. *Epstein*, 87 Cal. App. 4th 862, 873.

In *International Longshoremen's*, LAXT argued that the Board of Harbor Commissioners, not the city council, delegated to LAXT the authority to construct and operate a new port facility. 69 Cal. App. 4th at 297-298. However, the court found that, by virtue of the council's authority over the Board of Harbor Commissioners, the delegation "could not have occurred without, at a minimum, the implied approval of the City Council." *Id.* at 299. Hence, "the delegation of authority to LAXT was effected by the City Council as the duly elected legislative body, so as to bring LAXT within the Brown Act." *Id.* at 299. The court underscored its conclusion, stating:

This interpretation is informed by the broad purpose of the Brown Act to ensure the people's business is conducted openly. Under LAXT's constrained reading of the Brown Act, the statute's mandate may be avoided by delegating municipal authority to

construct and operate a port facility to a private corporation. . . .
Surely that is not what the Legislature intended.

Id. at 300.

In *Epstein*, the POA argued that the administrative functions of the BID were not delegated, but were structured to be handled by the POA from the outset. 87 Cal. App. 4th 862, 872. The court rejected that contention based on the city's creation of the BID pursuant to statute and based on the city's retention of plenary decision making authority over the BID, also as required by statute. 87 Cal. App. 4th 862, 873. The city retained power over the POA to "modify the improvements and activities to be funded with the revenue derived from the levy of assessments," as required by law. *Id.* Accordingly, the city had lawfully delegated its administrative functions to the POA, and the POA must comply with the same laws and regulations as the city in carrying out those delegated functions. *Id.* See also, 85 Op. Cal. Att'y Gen. at 58.

C. Based on the Broad Definition of "Created By," the Conservancy Board Is Likely a Legislative Body Subject to the Brown Act

1. The City "Played a Role In" the Formation of the Conservancy

The Balboa Park Conservancy was formed at the end of almost five years of studies and recommendations on the best path forward for meeting the needs of the City's Balboa Park. Like the analysis in the cases discussed above, we must look at the circumstances surrounding the formation of the Conservancy to determine whether the Conservancy was "created by" the City Council. See *Epstein*, at 864. Accordingly, the analysis and conclusions set forth in this memorandum are based on the following facts:⁵

- Balboa Park is wholly owned, operated, and maintained by the City of San Diego.
- In August 2006, the Trust for Public Land's⁶ Center for City Park Excellence issued a short study commissioned by the Legler Benbough Foundation "to help determine the best possible model for successfully and sustainably operating a park as large and complex as Balboa." The study examined public-private partnerships in four major cities and concluded that the City and Balboa Park would benefit from a private partner "that helps plan and implement capital projects, do programming, solicit volunteers, and possibly even undertake maintenance."⁷

⁵ Additional facts could change the analysis and conclusions reached here.

⁶ The Trust for Public Land, based in Washington D.C., is a nonprofit corporation dedicated to park conservation.

⁷ "Keeping Balboa Park Magnificent in its Second Century: A Look at the Management, Fundraising, and Private Partnerships at Five Other Major U.S. City Parks," The Trust for Public Land, Center for City Park Excellence (Aug. 2006).

- In January 2008, the Center for City Park Excellence issued a second report summarizing three studies commissioned by the Legler Benbough Foundation, the San Diego Foundation, and the Parker Foundation for the purpose of providing the factual basis “necessary to have an informed and robust public discussion about the future of the park.”⁸ The three studies were: “User Survey Report” documenting Balboa Park usage by the Morey Group; a sample list of capital and maintenance needs in Balboa Park compiled by the City’s Park and Recreation Department; and “Options and Opportunities: New Management Paradigms for Balboa Park” by the Keston Institute for Public Finance and Infrastructure Policy at the University of Southern California.
- Following issuance of the report, Mayor Sanders and Councilmember Atkins tasked the City’s Balboa Park Committee with examining the future of Balboa Park.⁹ In March 2008, the Committee began conducting monthly public meetings for its “Balboa Park Study.” At the meetings, the Committee received public input and heard presentations on different models for park governance.¹⁰
- On December 18, 2008, the Balboa Park Committee released its Balboa Park report directed to the Mayor and City Council.¹¹ The report recommends that the City consider forming a nonprofit entity to assist the City with the governance, fundraising, and management for Balboa Park, operating through a contractual agreement with the City. The report also recommends that the City create a Balboa Park Task Force to further study and refine the Committee’s recommendations.
- On January 15, 2009, the Balboa Park Committee’s report was presented to the City’s Park and Recreation Board as an information item.¹²
- In October 2009, the Mayor created the Balboa Park Task Force and appointed its members. The stated purpose of the new Task Force is “to make determinations and recommendations to the Mayor and City Council” re the new nonprofit entity.¹³ The Task Force held seven noticed public meetings.
- On April 19, 2010, the Task Force issued its report (the Task Force Report) to the Mayor and City Council recommending that an organizing committee be appointed to form the new nonprofit entity and to negotiate an agreement with the City to define the new entity’s role.¹⁴ The Task Force Report recommended that

⁸ *Supra*, n. 2.

⁹ The Balboa Park Committee advises the Park and Recreation Board, Mayor, and City Council on policy issues relating to the acquisition, development, maintenance, and operation of Balboa Park. The members of the Committee are appointed by the Mayor and confirmed by the City Council. San Diego Municipal Code § 26.30(f).

¹⁰ See Minutes of Balboa Park Committee meetings for February through December, 2008.

¹¹ *Supra*, n. 2.

¹² See Minutes of Park and Recreation Board meeting, Jan. 15, 2009.

¹³ News Conference, October 12, 2009, www.sandiego.gov/mayor/news/2009.shtml.

¹⁴ *Supra*, n. 2.

the primary purpose of the new entity be to raise funds for projects in Balboa Park and spend those funds pursuant to a City-approved plan. The new entity would start with modest goals, but “would ultimately be involved in a broad range of parkland activities ranging from planning through capital construction to maintenance and would contract with the City through a MOU to define the roles and responsibilities between the City and the New Entity.” The Report anticipated that the MOU would be renegotiated over time to accommodate the new entity’s expanding role.

- On May 5, 2010, the Balboa Park Committee accepted the Task Force Report, endorsed its findings and conclusions, and recommended it to the Rules Committee and City Council.
- On May 19, 2010, the Task Force Report “on formation of a new public benefit nonprofit corporation” was presented to the Rules Committee as an information item. After a detailed presentation and full committee discussion, the item was forwarded to the full City Council.
- On July 13, 2010, the Task Force Report “regarding the formation of a new public benefit non-profit corporation and the creation of a public private partnership with the City to assist with funding, management, and governance of Balboa Park” was presented to the City Council, also as an information item. No action was taken.
- In September 2010, the Mayor appointed the members of the organizing committee for what is now the Balboa Park Conservancy.¹⁵
- On April 13, 2011, the Balboa Park Conservancy was formed for the following “specific” purpose: “to promote, support, fund, implement, facilitate, manage and oversee projects to restore, preserve, maintain and improve the park land, buildings and infrastructure of Balboa Park in the City of San Diego; and to support the management, governance and funding of Balboa Park in the City of San Diego.” The Conservancy’s bylaws were filed on May 10.
- The members of the initial board are the same individuals who served on the organizing committee.

Throughout this history, no direct formal action was taken by the City Council or the Rules Committee to approve or recommend the formation of the corporation. As made clear in the cases discussed above, however, formal action is not required for the elected legislative body to “play a role in bringing the corporation into existence.” Keeping in mind the instruction to broadly construe the Brown Act to avoid evasion, it is difficult to escape the conclusion that the Conservancy was formed at the behest of the City to serve a City purpose. *Frazer*, 18 Cal. App.

¹⁵ The members of the organizing committee and initial board are: Chuck Hellerich (Chair), Carol Chang (Vice-Chair), Joy Blount, Ben Clay, Maru Davila, Ray Ellis, Joyce Gattas, Vicki Granowitz, Connie Matsui, Paul Meyer, Judy Swink, and Stacey LoMedico (non-voting member).

4th 781, 792 (Brown Act should be broadly construed to cover the many ways in which advisory entities can be formed); *International Longshoremen's*, 69 Cal. App. 4th 287, 300 (narrow reading of the statute for avoidance of Brown Act requirements is not what the Legislature intended).

Here, the Conservancy was formed after a very public process for the purpose of assisting the City with the funding, governance, and management of its property. The Balboa Park Committee issued its report to the Mayor and City Council after seventeen public meetings and in response to a request from the Mayor and a Councilmember that it answer specific questions and make recommendations related to the future funding, management, and governance of Balboa Park. The Balboa Park Committee is a committee established by ordinance of the City Council for the purpose of advising the City Council, Mayor, and Park and Recreation Board on matters pertaining to Balboa Park and derives its authority from the City Council. San Diego Muni. Code § 26.30(f). The Committee's report includes definitive recommendations to create a new nonprofit corporation and an immediate action item to form the Balboa Park Task Force. The Mayor formed the Balboa Park Task Force which then took up the Balboa Park Committee's recommendations and, after seven public meetings, issued its report to the Mayor and City Council making specific recommendations about the structure and governance of the new nonprofit. After the Balboa Park Committee's official endorsement of the Task Force Report, and a hearing of the Report at the Rules Committee and at the City Council,¹⁶ the Mayor, following the Report's recommendation, appointed the members of the organizing committee to form the Conservancy. The Conservancy was then formed for an express purpose that meets the needs stated in the Balboa Park Committee's Report and the Task Force Report.

There are distinct differences between the facts here and those presented in the cases discussed above that arguably make the question of whether the Conservancy was "created by" the City Council less clear. In *International Longshoremen's*, for example, the city council's approval of a shareholder agreement and the Harbor Commission's approval (and the city council's implicit approval) of a lease were essential to the new corporation's existence. 69 Cal. App. 4th 287, 295-296. In *Epstein*, the city council's adoption of a business improvement district created the need for a new property owners' association to manage that district. 87 Cal. App. 4th 862, 870-871. Here, the focus of the Conservancy is an existing City park and the City has not formally adopted a plan to create a role for a nonprofit corporation in the funding, management, or governance of that park.

The City has, however, through the Balboa Park Committee, an advisory committee authorized and empowered by the City Council, formulated such a plan and, through the Mayor, acted on the Committee's recommendations for the formation of the Conservancy. Both the City and the Conservancy anticipate entering into an agreement setting forth the working relationship between the City and the Conservancy and establishing the Conservancy as the City's official proponent for improved management, governance and funding of Balboa Park. Such an agreement was recommended by the Balboa Park Committee and the Balboa Park Task Force to

¹⁶ At the City Council meeting on July 13, 2010, the Council discussion included comment that no action was needed from the Council on that date for the matter to move forward, and that the Proposed Agreement would be coming back to the City Council for its approval.

establish the special relationship between the City and the new corporation,¹⁷ and was discussed in conjunction with the Task Force Report at the City Council.

Without the Proposed Agreement, the Conservancy is, arguably, just one more of the several groups interested in and working for the benefit of Balboa Park independent of the City and would not be in a position to directly assist the City with its needs, as identified in the Balboa Park Committee and Task Force Reports. As reflected in the reports and studies leading up to the formation of the Conservancy, the City's need is for a relationship with a nonprofit corporation that is different than its relationships with existing nonprofits. The purpose of the Proposed Agreement is to create that special relationship, setting the Conservancy apart as the chosen nonprofit working strategically with the City to ensure the future well-being of Balboa Park, and setting the stage for a gradual but increasing shift in responsibility from the City to the Conservancy for the care of Balboa Park.

Approval by the City Council of the Proposed Agreement will be the culmination of this long series of events leading to the Conservancy as the City's partner and providing the Conservancy with the purpose for which it was formed. By entering into the Proposed Agreement, the City is giving the Conservancy a reason for existing that was intended from the outset. As in *International Longshoremen's and Epstein*, the Conservancy is not "simply a 'preexisting corporation' that just 'happened' to be available" to assist the City. Rather, it was formed and structured for the sole purpose of assisting the City in meeting its obligation to fund, manage, and maintain Balboa Park. Accordingly, if the Proposed Agreement is approved, the requirement that the corporation was "created by" the elected legislative body will be met.

2. The Formation of the Conservancy Contemplates the Delegation of Authority

The Task Force Report recommends the formation of the Conservancy and an agreement between the City and the Conservancy to "define the roles and responsibilities" of the two parties. The Report envisions an agreement with contractual obligations that changes over time as the Conservancy's responsibilities related to the park increase. Initially, the Conservancy would raise and spend money "under a plan of action that is coordinated and mutually agreed upon with the city." Task Force Report, p. 11. Through these initial activities, the Conservancy would gain experience and trust, and gradually expand its role into working with the City on "issues, projects, and policies in Balboa Park" and acting in "an advisory role" "in assisting with establishing priorities among various Park needs and proposals," and more. *Id.*, pp. 11-12.

The Conservancy proposes to enter into an initial agreement with the City that does not delegate authority to the Conservancy, and instead focuses on the Conservancy's independent

¹⁷ See the General Conclusions in the Task Force Report, page 4: "3. The MOU should allow the New Entity to work directly on City-approved projects in the Park in ways not presently possible for existing organizations . . . ; 4. . . . The New Entity would raise money independent of the City but spend it under a plan of action that is mutually agreed upon through the MOU with the City. . . ." See also pages 11-12 of the Task Force Report re the new entity's special relationship with the City.

fundraising activities and the Conservancy's selection and prioritization of projects on which it decides to expend the funds raised. The Conservancy would be an advocate for the Park, but not an advisory board, working instead through established boards and committees like the Balboa Park Committee to provide its input or bring projects forward. At the same time, the Conservancy would have special access to City staff, would submit an annual plan to the City, would implement projects to improve Balboa Park, and would coordinate its activities with the City.

The Conservancy envisions that at some point in the future, the Conservancy's role and responsibilities would change and the parties would enter into a new agreement reflecting a true delegation of duties by the City to the Conservancy. In the Conservancy's view, at and from that point, the provisions of the Brown Act would apply and until that time, the Conservancy would not be subject to the Brown Act's requirements.

There is, however, a fundamental inconsistency between the approach favored by the Conservancy and section 54952(c)(1)(A) of the Brown Act. Again, that provision includes within the definition of "legislative body" the board of a corporation "created by the elected legislative body *in order to* exercise authority that may lawfully be delegated by the elected governing body to a private corporation." (Emphasis added.) Based on the plain language of the statute, it is not the point at which the corporation exercises a delegated authority that makes it a legislative body, but rather, the purpose for which the corporation was created.

In this instance, every indication is that the Conservancy was created for the purpose of, even if not immediately, exercising authority to be delegated to it by the City. That intent is reflected not only in the reports of the Balboa Park Committee and the Balboa Park Task Force recommending the creation of the Conservancy, but also in the purpose of the corporation as stated in its bylaws: "to promote, support, fund, implement, facilitate, manage and oversee projects to restore, preserve, maintain and improve the park land, buildings and infrastructure of Balboa Park in the City of San Diego; and to support the management, governance and funding of Balboa Park in the City of San Diego."

It is the intent of the parties, as evidenced by the Proposed Agreement, to establish the Conservancy as the City's official partner in the improvement of Balboa Park, and for the Conservancy to not only raise funds, but also to implement projects, provide input into policy, and increasingly become more involved in park matters. The Proposed Agreement also reflects the intent of the parties to enter into separate subsequent agreements for the implementation of specific projects, including the necessary authority for the Conservancy to move forward with projects on City property.

Applying the Brown Act to the Conservancy as a corporation created for the purpose of exercising authority delegated to it by the City, instead of at the point such delegation takes place, removes the question of at what point the Conservancy is exercising such authority, and the potential for technical avoidance of the Brown Act's requirements leading up to that point. Following the Conservancy's approach would place the City and the Conservancy in the untenable position of identifying the point just before the Conservancy's role grows into an

actual delegation and implementing Brown Act requirements before that point. The better course, consistent with the Brown Act, is to acknowledge the instrumental role the Conservancy is intended to play in what is essentially the public's business, follow the Brown Act from the outset, and form the habits of a publicly accessible board. For a City resource as important to the public as Balboa Park, keeping all phases of government decision-making relating to the Park open to the public, is the Brown Act's mandate.¹⁸

III. APPLICATION OF THE CALIFORNIA PUBLIC RECORDS ACT TO THE BALBOA PARK CONSERVANCY

The California Public Records Act applies to "local agencies" as that term is defined in section 6252(a) of the Act. Included in that definition are corporations that meet the definition of "legislative body" under section 54952(c) and (d) of the Brown Act. Accordingly, a corporation that is a legislative body under section 54952(c) of the Brown Act, is also a local agency under section 6252(a) of the Public Records Act. 85 Op. Cal. Atty. Gen. 55 (2002) (Public Records Act applies to private nonprofit corporation that is a legislative body under the Brown Act).

Like the Brown Act, the Public Records Act "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." *Filarsky v. Superior Court*, 28 Cal. 4th 419, 425-426 (2002). "All public records are subject to disclosure unless the Act expressly provides otherwise." *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 751 (2006), *rev. denied* (Dec. 13, 2006). The policy favoring disclosure was endorsed by California voters' approval of Proposition 59 in 2004, amending the California Constitution and giving Californians a constitutional right to access "information concerning the conduct of the people's business." Cal. Const., art. 1, § 3 (b)(1); *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1320 (2009); *BRV, Inc.*, 143 Cal. App. 4th at 746. Proposition 59 requires that the Public Records Act "be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." *BRV, Inc.*, 143 Cal. App. 4th at 750. The right of access to public records under the Act is not absolute, and the Public Records Act includes specific exemptions to protect privacy interests. *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1282 (2006); *County of Santa Clara*, 170 Cal. App. 4th at 1320.

¹⁸ See also, Council Policy 000-16, that provides that all "City-appointed" boards, commissions, and corporations conduct open meetings that have been properly noticed to the public and "closely adhere to the requirements of the Brown Act." The term "City-appointed" is not defined in the Policy and has generally been applied to those boards, commissions, or corporations where the City, either through the Mayor, Council, or other authorized City official, appoints the individual members. See, e.g., 1990 City Att'y MOL 473 (90-45; Mar. 30, 1990). In this instance, although the Mayor appointed the organizing committee that then formed the first board, the Conservancy's bylaws provide for the directors to be elected by the Board of Directors. Accordingly, in this instance, we look to the Brown Act itself and not the Policy to determine the Brown Act's application. That said, compliance by the Conservancy with the Brown Act is consistent with the spirit of the City's policy for open government.

In the California Attorney General's Opinion cited above, after determining that a nonprofit corporation was a "legislative body" pursuant to section 54952(c) of the Brown Act, the Opinion concludes that the corporation is also a "local agency" subject to the Public Records Act based on the clear definition of that term contained in section 6252. 85 Op. Cal. Atty. Gen. 55, 59. "Our answer to the first question thus answers the second question." *Id.*

CONCLUSION

Although it is not entirely clear under available caselaw, based on the totality of the facts at hand and the proposed relationship between the City and the Conservancy, a court would likely find that the City played a role in bringing the conservancy into existence, that the Conservancy was created to take a role in the funding, management, and governance of Balboa Park including the exercise of authority to be delegated by the City, and that as such, the board of the Conservancy is a legislative body under the Act. As a legislative body under the Brown Act, the Conservancy is also a local agency subject to the California Public Records Act.

The Brown Act, the State Constitution, and the City Charter mandate government decision making that is open to the public. Consistent with the spirit and intent of these laws and with City policy, we recommend that the City treat the Conservancy as a Brown Act entity and require, as part of the Proposed Agreement, compliance with the Brown Act and the Public Records Act.

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