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OPINION NO. 2004:8

The Honorable Education and
Neighborhoods Committee
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

**RE: ANALYSIS OF LEGAL FRAMEWORK APPLICABLE
TO NEIGHBORHOOD COUNCILS**

PART TWO: THE BROWN ACT

Honorable Members:

This office is pleased to provide the second report on the legislative and regulatory scheme applicable to neighborhood councils. This report will address The Ralph M. Brown Act, California's "open government" law, codified at California Government Code Sections 54950, *et seq.*

BACKGROUND

Local legislative bodies in California are subject to a comprehensive set of laws ensuring "open government" entitled the Ralph M. Brown Act (the "Brown Act" or "Act"), Government Code Sections 54950, *et seq.* The Brown Act provides the public with access to the deliberative process of local government with the aim of facilitating public participation and curbing secrecy. *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555. The Brown Act is liberally construed to accomplish its important purpose. *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 294.

The Brown Act contains several distinct provisions regulating the manner in which legislative bodies conduct business. These include sections, among many others, addressing the right of the public to attend meetings and provide testimony to legislative bodies (§§ 54953.3, 54954.2, 54954.3), the requirements for meeting agendas, including their content, timing and publication (§§ 54954, 54954.2), the acceptable locations for meetings (§ 54954), the application of these "meeting" requirements to certain writings,



telephone conferences and electronic mail (§§ 54952.2, 54953), as well as the limited exceptions to these requirements (§§ 54954.5, 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54956.95, 54957, 54957.1, 54957.2, 54957.5, 54957.7).

Willful violations of the Brown Act can result in criminal penalties (§ 54959), as well as substantial civil penalties for violations, even if inadvertent (§ 54960). Civil penalties include injunctive relief, as well as payment of attorneys' fees and costs to any party establishing a violation (§§ 54960, 54960.1, 54960.5).

Openness and transparency are key to the success of neighborhood councils. Recognizing this fact, the Charter framers ensured that neighborhood councils would operate in this very manner, requiring that any neighborhood council seeking certification "guarantee that all meetings will be open and public, and permit, to the extent feasible, every stakeholder to participate in the conduct of business, deliberation and decision-making" Charter § 906(a)(6), and that "neighborhood councils adopt fair and open procedures for the conduct of their business." *Id.* §904(g). However, this Charter language also suggests that its framers did not anticipate that the Brown Act would apply to neighborhood councils as this language would have been superfluous had there been an understanding that the mandates of the Brown Act would compel open meetings.

In the Fall of 2000, the General Manager of the Department of Neighborhood Empowerment ("DONE"), the City Department created to administer the system of neighborhood councils, asked this office whether the neighborhood councils would be subject to the Brown Act. In a letter dated November 16, 2000, this office advised that the Brown Act was applicable to neighborhood councils because they were created by the Charter and ordinance. In May of 2001, the City Council approved the Charter-mandated Plan for a Citywide System of Neighborhood Councils ("Plan"), which included a provision that required neighborhood councils to place in their by-laws an agreement to abide by the Brown Act in order to receive City Certification. Plan, Article III, § 2(c).

DONE reports that questions regarding Brown Act compliance are the most frequent inquiries it receives. While neighborhood councils have embraced the purpose and spirit of the Act, there have been complaints that at least some of the requirements of the Act unnecessarily impede neighborhood council operations without conferring the corresponding benefits the Act is meant to achieve. In other words, the Act is often viewed as overly burdensome and impractical in light of the fact that neighborhood councils are volunteer advisory bodies with little or no staff, and that neighborhood councils do not have an established work headquarters, but instead are geographically dispersed among residences, schools and businesses throughout the community. Accordingly, limitations on electronic communication, as well as posting and notice requirements for subcommittee meetings have been cited as particularly problematic for neighborhood councils.

For example, most of the City's preparatory work is done by staff that meet in private to discuss and develop proposals and, when completed, send them to the commission or the City Council for public discussion and action. However, in the case of neighborhood councils, the board members quite often are their own staff. If a neighborhood council board tasks its subcommittee on housing matters to develop a proposal for consideration by the board, unlike City staff and virtually any other group, the subcommittee must notice every working meeting in compliance with the Brown Act and refrain from using e-mail to exchange ideas or comment on drafts; something the City takes for granted in its own working environment.

Additionally, the Brown Act imposes certain limitations on the ability of neighborhood council members to meet with their City legislators.¹ These limitations do not similarly apply to groups whose interests in neighborhood councils may be competing against, such as individual businesses, non-city government entities, developers and their lobbyists.

Given these limitations, neighborhood councils do not always enjoy access to City Hall equal to that enjoyed by special interests, or even a level playing field with City government itself.

QUESTIONS PRESENTED

1. Are neighborhood councils subject to the requirements of the Brown Act?
2. What attributes of neighborhood councils trigger application of the Brown Act?
3. What steps, if any, may be taken to create an exemption for neighborhood councils from all or certain requirements of the Brown Act if the City's policymakers so desire?
4. If measures are adopted to remove neighborhood councils from the ambit of all or certain provisions of the Brown Act, what replacement measures could be employed to ensure that work conducted by the neighborhood councils remains transparent and open to all stakeholders?

¹ For instance, the Brown Act could be interpreted to prohibit neighborhood council members from meeting with a quorum of the Council or any of its subcommittees, in one meeting or through a series of meetings to advocate a certain position or provide information on any matter within the Council's jurisdiction.

SHORT ANSWERS

1. Yes. Neighborhood councils are considered “legislative bodies,” subject to the requirements of the Brown Act.
2. The Brown Act defines “legislative bodies” broadly to include any entity, even an advisory entity, which is formed by formal governmental action. The Charter’s creation of the system of neighborhood councils, the City’s certification of neighborhood councils that meet established criteria, the role designated for neighborhood councils and the funding provided by the City to neighborhood councils, together, if not singularly, constitute formation by “formal action” sufficient to impose the Brown Act on neighborhood councils.
3. If it were decided that neighborhood councils should be exempted from all or some of the requirements of the Act, there are two potential avenues that may be pursued. The first is to require a comprehensive restructuring of the system of neighborhood councils through amendments to the City Charter and related ordinances. The restructuring would require voluntary reconstitution of neighborhood councils independent from City Hall as non-profit corporations under the Internal Revenue Code. This would enable neighborhood councils to avail themselves of an existing legislative exemption for non-profit corporations that do not perform any delegated government functions.

A second avenue is state legislation securing a statutory exemption to the Brown Act or certain of its requirements. There is precedent for such an exemption, as one exists in the California Education Code for certain advisory school councils.

4. The Brown Act is not the only way to ensure that neighborhood councils conduct business in an open and inclusive manner. Indeed, the legislative exemption for certain school advisory councils contains substitute requirements that mirror the most fundamental components of the Brown Act (the agenda and meeting notice requirements) without extensive elaboration. If such a legislative exemption is secured for neighborhood councils, we recommend that similarly simple and straightforward open meeting requirements be required for neighborhood councils.

DISCUSSION

I. Neighborhood Councils Are Subject To The Brown Act Because They Are "Legislative Bodies" Within The Meaning Of The Brown Act

The Brown Act is applicable to all "legislative bodies" of local government. Section 54952(b) of the Government Code defines a "legislative body" as:

"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."

Cal.Gov't Code §§ 54952(b).

The courts have interpreted this section to apply to **any** body created by formal action of a legislative body, regardless of the composition of its membership. *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 803-805; 1997 Cal. AG LEXIS 70. However, a private corporation created by a legislative may not be subject to the Brown Act. Cal.Gov't Code § 54952(c). See, *infra*, section III A., for a discussion of § 54954(c).

Hence, the relevant question is whether neighborhood councils were "created by" Charter or other formal City action. Arguably, neighborhood council boards are not "created" by the Charter or the Plan. In a sense, neighborhood councils are self-selecting groups of stakeholders who avail themselves of the opportunity afforded by the Charter to organize, become certified and formalize the channel through which they communicate with their elected, governing officials. However, under existing interpretations of the Brown Act, the City's action in creating a framework in its Charter and its role in certifying and funding neighborhood councils together, if not singularly, are sufficient to bring neighborhood councils within the ambit of the Brown Act.

The term "created by" has been defined to include a legislative body's adoption of procedures for creating an advisory committee. *Frazier v. Dixon Unified School Dist.*

(1993) 18 Cal.App.4th 781, 792-793. Even a "for profit" corporation that is actually created by a vote of its own shareholders was held to be subject to the Brown Act in a circumstance where governmental approval was given to the role of the corporation in assisting with a governmental function. *International Longshoremen's and Warehousemen's Union, et al. v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 299.

Similarly, in *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805 the court held that the Brown Act applied to a committee formed by formal action of a City Council as a result of the City Council's action to designate who could serve as members of the committee, along with setting the agenda for the committee of interviewing candidates and making recommendations to the City Council.

In the case of *Epstein v. Hollywood Entertainment District II Business Improvement Dist.* (2001) 87 Cal.App.4th 862, the court held that the Brown Act was applicable to a private, non-profit property owners' association ("POA") because it had been "created" by the City of Los Angeles. The City adopted an ordinance establishing a business improvement district in the Hollywood area ("BID I") pursuant to the Property and Business Improvement District Law of 1994 (codified at Sections 36600 *et seq.* of the Streets and Highway Code) and called for the creation of a non-profit association to administer its functions. Shortly thereafter a POA filed articles of incorporation and the City entered into a contract with the POA to administer the BID I. Subsequently, the City expanded the boundaries of BID I and created a second business improvement district ("BID II"). The POA continued to administer the assessments collected from the property owners in the larger BID II. Pursuant to statute and common law, the City retained the ability to overturn the POA's decision. Cal.St. & Hy. Code § 36642. *See also, International Longshoremen's, supra*, 69 Cal.App.4th at 300; 81 Ops.Cal.Atty.Gen. 281.

The *Epstein* court rejected the City's arguments that the POA was created by and administered by the local property owners and that it would be unfair to interfere with the property owners' private business activities in running their POA. *Id.* at 865. In concluding that the City had "created" the POA, the court made several findings. *Id.* at 865-866. It held the POA could not create the BID itself because a private corporation does not possess the power of taxation. *Id.* at 865. Further, it held that the City had in essence created the POA because it had created the BID by an ordinance which required that the BID be run by a POA. *Id.* Thus, the court stated that the City's formation of the BID was the "*raison d'être*" for the POA. *Id.* Additionally, the *Epstein* Court noted that pursuant to the law of delegation, the City could only delegate authority to the POA if it retained the authority to overturn the POA's actions. *Id.* Lastly, in dismissing the argument that the POA was a group of self-organized business persons administering their own affairs, the

Epstein court observed that membership in the BID was not necessarily voluntary, but included all businesses within the BID boundaries.

“Needless to say, if local business people want to form property owners associations to try to improve their local community, they are free to do so. They may hold their meetings in secret, by invitation only, or may invite the general public, limited only by whatever laws, if any, are applicable to such groups. However, participation in such purely private, purely voluntary organizations differs dramatically from participation in a BID. For example, membership in a private business owners’ organization is voluntary, and, presumably, membership can be terminated at will. In contrast, “membership” in a BID may be involuntary for a majority of the property owners within the BID. . . .” *Id.* at 866.

The California Attorney General also has addressed the issue of what constitutes sufficient governmental involvement in the formation of an entity at issue to constitute “creation” by a legislative body. The Attorney General examined the status of an academic senate to determine whether it had been “created by” the State Board of Governors of the California Community Colleges, a legislative body under the Brown Act. State statutes required the Board of Governors to form and consider the input of advisory academic senates composed of community college faculty representatives. Cal. Admin. Code § 53201. The California Administrative Code also set out the procedures to be followed in the formation of senates and mandated that the Board of Governors “recognize” the senates once formed and establish additional procedures for the senates after formation. Cal. Admin. Code § 53202. The State Attorney General dismissed the proposition that the senates were self-created by a vote of the faculty of the community colleges themselves, noting that the Board of Governors was required by the Administrative Code to ensure the senate’s formation, recognition and establish election procedures. *Id.* Accordingly, the State Attorney General held that the senates were “created by” the Board of Governors and were subject to the Brown Act.

Undoubtedly, the City will be deemed to have created neighborhood councils under the applicable cases and State Attorney General opinions interpreting section 54952(b) of the Government Code. As in the *Epstein* case, the City plays a pivotal role in the formation of neighborhood councils by setting out the framework and certification process for recognition. Both the *Frazier* case and the State Attorney General Opinion on academic senates demonstrate that the City “created” neighborhood councils by granting official certification for neighborhood councils that organize according to City established criteria. L.A. Charter §§ 901(b), 904 and 906; Plan Art. IV. The City intervenes in the operations of

neighborhood councils, as was the case in the *Joiner* decision, by mandating diversity of membership, regular communications, open meetings and even term limits for governing body members. *Id.* The City bestows on certified neighborhood councils a mechanism for systematic communication with City officials through the Early Notification System. L.A. Charter § 907. Like the case of *International Longshoremen's*, the City establishes the role for neighborhood councils of conducting hearings, monitoring City services, providing advice (including budgetary advice) in advance of decisions by public officials and recommending improvement projects for City expenditures. L.A. Charter §§ 908-910. Plan Art. VIII. The City funds the operations of the neighborhood councils. L.A. Charter § 911; Plan Art. VIII. Accordingly, the City "created" neighborhood councils and, hence, they are subject to the Brown Act.

II. Attributes Of Neighborhood Councils That Trigger Application Of The Brown Act

A. Creation Of Neighborhood Councils By Legislative Action

The attributes of neighborhood councils were established in part directly by the Charter and in part indirectly by the Charter in directing the City Council to adopt the Plan for neighborhood councils.

The Charter established the concept and legal framework for the system of neighborhood councils. Charter §§ 901-914. The Charter states under the heading "Purpose" the following about the system of neighborhood councils: To promote more citizen participation in government and make government more responsive to local needs, a citywide system of neighborhood councils, and a Department of Neighborhood Empowerment **is created.**" (L.A. Charter § 900, emphasis added).

The Charter, through the creation of a DONE as a new City department provided a formal mechanism for the City to assist neighborhood councils in their formation and operations. The Charter specified that DONE would have the authority "to administer" the new system of neighborhood councils. The Charter created a DONE Board of Commissioners ("BONC"), vested responsibility for policy, oversight, contracting, leasing and promulgation of rules and regulations in a DONE Board of Commissioners. Charter § 902. The Charter also created the position of General Manager/Chief Administrative Officer of DONE with the authority and responsibilities outlined in Section 510 of the Charter. Charter § 903.

DONE is required by the Charter to assist neighborhood councils with electing officers, training and various other matters. L.A. Charter § 901.

The Plan established additional responsibilities for DONE, as follows:

- 1) assist the neighborhood councils with ordinances and laws pertaining to them;
- 2) provide training in civic outreach;
- 3) assist with certification petitions;
- 4) facilitate meetings and communications;
- 5) organize a bi-annual conference of neighborhood councils;
- 6) facilitate communication between the neighborhood councils and City government;
- 7) assist neighborhood councils with the election of their governing bodies;
- 8) provide operational support including meeting space, administrative support and supplies;
- 9) create and maintain a central, informational data base;
- 10) act as an information resource;
- 11) create an "Early Notification System" between the City and the neighborhood councils;
- 12) ensure equal opportunity to form neighborhood councils by education, assistance with the certification process and mitigation of barriers to inclusion;
- 13) prepare an annual report on the state of the system of neighborhood councils;
- 14) prepare a quarterly report on the status of certification efforts;
- 15) train the officers and staff of neighborhood councils; and
- 16) provide adequate staffing to neighborhood councils.

Plan Art. VI.

B. The Charter And Plan Specify Requirements With Which Neighborhood Councils Must Comply To Receive "Official" City Certification

The Charter and the Plan also establish a procedure for the City to "certify" neighborhood councils in accordance with specified mandates. L.A. Charter §§ 901(b), 904 and 906; Plan Art. IV. In order to be certified, a neighborhood council must petition for certification and demonstrate compliance with Charter and Plan requirements. These mandates address several aspects of neighborhood council composition and function, including:

- 1) Acceptable Boundaries and Population Totals. L.A. Charter §§ 901(b), 904(c); Plan Article III, § 2(a);
- 2) Membership Outreach Efforts and Signature Requirements. Plan Article III, § 2(b);
- 3) Diversity of Membership. L.A. Charter Section 900; Plan Article II, Section 2;
- 4) Officer Selection and Term Limits. L.A. Charter § 906(a);
- 5) Open Conduct of Business, Including Mandatory Compliance with the Brown Act. L.A. Charter §§ 904(g), 906(a)(6). Plan Article II, § 3; Plan Article III, § 2(c)(iii);
- 6) Regular Communication with Shareholders. L.A. Charter § 906(a)(3);
- 7) Financial Accountability. L.A. Charter § 906(a)(5).

The process by which a neighborhood council obtains official City certification requires a neighborhood council to meet the criteria established in the Plan. Plan Arts. III, IV. DONE reviews a neighborhood council's application for compliance. Plan Art. IV, § 1. DONE forwards the application to BONC for consideration. Plan Art. IV, § 3. DONE may make a recommendation to BONC on the application. § 2(b)(iii). BONC acts on the application at a regularly noticed, public hearing. Plan Art. IV, §§ 3-8. In the case of competing applications that have identified overlapping boundaries, BONC makes the determination of how the boundaries shall be drawn. Plan Art. IV, § 7. BONC's denial of certification may be appealed to the City Council. Plan Art. IV, § 9.

A certified neighborhood council may be involuntarily de-certified for violation of the Plan, if an attempt to remedy the violation is unsuccessful. Plan Art. V, § 5. BONC presides over noticed, public hearings regarding de-certification. Plan Art. V, § 5. A certified neighborhood council also may petition upon approval by three-quarters of the governing body of the neighborhood council for voluntary de-certification. Plan Art. V, § 6. After approval by BONC of an application for voluntary de-certification, a neighborhood council must return all unexpended City funds and resources. Plan Art. V, § 6.

C. Formalization Of Notice To And From Certified Neighborhood Councils Through An "Early Notification System"

The Charter provides that a neighborhood council may provide input to City officials before their decisions are made through an "Early Notification System" ("ENS"). L.A. Charter § 907. The Plan elaborates on the details of the ENS. The ENS is to be available to certified neighborhood councils and is to be a supplement to all other forms of notice and information the City is otherwise obligated to provide by law to the general public. Plan Art. VII. The Plan requires DONE to establish an ENS website that will provide information to certified neighborhood councils with information on the business conducted by the City Council and its committees. Plan Art. VII, § 2. Each certified neighborhood council is entitled to engage in direct e-mail communications with City departments and agencies through an officially designated e-mail address in such a manner as to ensure its receipt by City officials before decisions are made. Plan Art. VII, §§ 4-6. The City is to provide computers to each certified neighborhood council and training to access the ENS website. Plan Art. VII, § 1.

D. Functions Established For Certified Neighborhood Councils

The Charter describes in general terms that neighborhood councils "shall have an advisory role on issues of concern to the neighborhood." Charter § 900. However, the Charter devises other more substantive roles for neighborhood councils:

1) Delegation Of Council's Public Hearing Authority

Under the heading "Powers of Neighborhood Councils," the Charter provides that the City Council "may delegate its authority to neighborhood councils to hold public hearings prior to the City Council making a decision on a matter of local interest." Charter § 908. To date, the City Council has not made a delegation of its hearing authority to any Neighborhood Council on any matter.

2) Budget Advice And Counsel

The Charter states that each neighborhood council "may present to the Mayor and Council an annual list of priorities for the City Budget." Charter § 909.

3) Monitoring of City Services

The Charter states that "Neighborhood councils **shall** (emphasis added) monitor the delivery of City services in their respective areas and have periodic meetings with responsible officials of City departments, subject to their reasonable availability." Charter § 910.

E. Funding By The City For Neighborhood Councils

The Charter required that the Mayor and the Council appropriate funds for the startup and functioning of neighborhood councils for the first two years after the Charter's adoption. L.A. Charter § 911. Thereafter, the Charter directs the Mayor and the Council to appropriate funds for DONE and neighborhood councils at least one year in advance of each subsequent fiscal year. § 911.

The Plan also addresses City funding for certified neighborhood councils both through the budget appropriations process and through grant process. Plan Art. I VIII, §§ 1 and 2. As amended on November 8, 2002, the City dictates the acceptable uses for City funds, which fall into two categories. First, certified neighborhood councils may use funding for their functions and operations, including procuring office space, equipment, supplies and the cost of communications. Plan Art. VII, § 1. Second, a certified neighborhood council, with the approval of DONE, may designate all or part of the money it receives to be used for neighborhood improvement projects. *Id.*

Currently, certified neighborhood councils receive \$50,000 per year in funding. Although this amount is not significant in isolation, when aggregated to include all current and future certified neighborhood councils, the total amounts to a substantial expenditure of governmental funds.

III. Options For Removing Neighborhood Councils From The Purview Of The Brown Act

If the City's policymakers were to determine that neighborhood councils should be exempted from all or portions of the Brown Act, two alternatives may be pursued. The first would involve amending the Charter and City ordinances to eliminate the certification process and the legal framework for neighborhood councils, withdrawing any delegated

authority, and allowing them to reconstitute as private, non-profit corporations under Section 501(c) of the Internal Revenue Code on their own volition in order to fall within the existing legislative exemption of Government Code Section 54952(c). The second method would involve securing a legislative exemption for neighborhood councils from the Brown Act without altering their current framework. The details of these two distinct strategies are discussed in detail below.

A. Reconstituting Neighborhood Councils As Non-Profit Corporations

Governments often establish, interact with, and fund private corporations, usually non-profit corporations formed under Internal Revenue Code Section 501(c). Despite the relationship between some private corporations and government, unless they meet the criteria established in Section 54952(c)(1), private corporations are not subject to the Brown Act.

Section 54952(c)(1) specifies two distinct types of private corporations that must comply with the Brown Act. First, a corporation that is created by a legislative body **and** exercises authority delegated to it by the legislative body, is subject to the Brown Act. § 54952(c)(1)(A). Second, a corporation that receives funding from a legislative body **and** includes on its board as a voting member a representative of a legislative body is subject to the Brown Act. § 54952(c)(1)(B).²

² The Brown Act criteria to establish whether private corporations fall within the definition of "legislative body" for compliance purposes is as follows:

As used in this chapter, "legislative body" means:

(c)(1) A board, commission, committee, or other multi member body that governs a private corporation, limited liability company, or other entity that either:

(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.

(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.

(2) Notwithstanding subparagraph (B) of paragraph (1), no board, commission, committee, or other multi member body that governs a private corporation, limited liability company, or other entity that receives funds from a local agency and, as of February 9, 1996, has a member of the legislative body of the local agency as a full voting member of the governing body of that private corporation, limited liability company, or other entity shall be relieved from the public meeting requirements of this chapter by virtue of a change in status of the full voting member to a nonvoting member.

Cal. Gov't Code § 54952(c)(1).

Stated another way, the Brown Act **does not** apply to a private corporation even if it is created by a legislative body so long as the corporation does not exercise delegated authority. § 54952(c)(1)(A). The Brown Act also **does not** apply to a private corporation even if it is funded by a legislative body so long as the corporation's board does not have as a voting member a representative of the legislative body funding it. § 54952(c)(1)(B). See, e.g., 80 Op. Atty Gen. Cal. 270 (1997) (the Santa Cruz Farm Bureau, a "nongovernmental" private corporation formed in 1933, which is one of 53 such farm bureaus that are part of the California Farm Bureau Federation, a nongovernmental, non-profit corporation, that received no government funding was not subject to the Brown Act even though the legislature gave the Bureau a role in filling vacancies on the Pajaro Valley Water Management Agency).

As outlined in Section IA. and IIA., *supra*, the City is deemed to have "created" the neighborhood councils for purposes of the Brown Act. If, however, the neighborhood councils were non-profit corporations that exercised no "delegated authority" they would be exempt from the Brown Act notwithstanding the City's role in their creation. Cal. Gov't Code § 54952(c)(1)(B). The Plan even contemplates that some neighborhood councils might opt to organize themselves as tax exempt entities or non-profit corporations. Plan Article II, § 4. Thus, an examination of what constitutes "delegated authority" is necessary to determine whether modifications could be made to the role established for neighborhood councils that will enable them to avail themselves of the private corporation exemption.

In *Joiner v. City of Sebastopol*, *supra*, 125 Cal.App.3d at 805, the Court held that the delegation by the City Council of its responsibility to fill vacancies on a planning commission to a committee charged with interviewing candidates and making recommendations was held to constitute a sufficient delegation of authority to warrant application of the Brown Act.

The State Attorney General has also addressed the issue of what constitutes a "delegation of authority" for purposes of section 54952(c) of the Brown Act. In 85 Op. Atty Gen. Cal. 55 (2002), the State Attorney General examined a situation in which the City of Thousand Oaks granted Cablevision a franchise to install and operate in the City in exchange for Cablevision setting aside a channel for educational use and to operate the channel until the City established a non-profit corporation to assume control. Cablevision gave \$25,000 to a consortium of educators chosen by the City to purchase television production equipment. Thereafter, a non-profit corporation ("Corporation") was formed and designated as the entity responsible for programming and managing the educational access channel. The City designated the Corporation as the recipient of the \$25,000, plus additional funding. No members of the City served on the Corporation's board, although the school district did appoint members. The City retained the right to review and approve

the Corporation's guidelines concerning the use of the channel and retained the right to terminate the authority delegated to the Corporation.

The California Attorney General concluded that the corporation was a "legislative body" for purposes of Government Code section 54952(c)(1)(A) because the City "played a role" in bringing the Corporation into existence because it: 1) granted a franchise to Cablevision; 2) required Cablevision set aside an educational channel; 3) designated the Corporation as the entity to operate the channel; and 4) indirectly provided the Corporation with its initial capitalization of \$57,000.00. *Id. citing Epstein, supra*, 87 Cal.App.4th at 870; *International Longshoremen's, supra*, 69 Cal.App.4th at 295. See also, *Epstein, supra*, 87 Cal.App.4th 862 (City's delegation to a private corporation of the authority to administer a business improvement district was a sufficient delegation of governmental authority to subject the corporation to the Brown Act.)

Moreover, the California Attorney General held that the authorization given by the City of Thousand Oaks to a non-profit corporation to operate an educational access channel, coupled with the City's reservation of a right to review and approve any guidelines was a delegation of a governmental function, sufficient to trigger the application of the Brown Act to the corporation. 85 Op. Atty Gen. Cal. 55 (2002). See, also 80 Op. Atty. Gen. Cal. 308 (1997) (delegation to a committee by the board of trustees of a school district of the ability to interview candidates for the office of district superintendent and make recommendations to the board constituted a delegation of governmental authority); 70 Op. Atty Gen. Cal. 57 (1987) (prior to the enactment of 54952(c), the Attorney General concluded that a private corporation that formed in order to acquire property for and build a sports complex with the ultimate goal of vesting ownership of the complex in the City of Oakland and the County of Alameda was a "legislative body.")

In order to fit neighborhood councils within the existing legislative exemption in Section 54952(c) of the Brown Act, certain Charter and ordinance amendments would be required. The first required Charter change would be withdrawal of Charter Section 908. Section 908 allows the City Council to delegate broad, undefined hearing authority to neighborhood councils. L.A. Charter § 908. This section creates an express though undefined "delegation of authority" from the City to the neighborhood councils. Although the City Council has not yet delegated any hearing authority to a neighborhood council, the existence of a Charter provision giving the City Council the ability to do so may be considered in determining whether and which government restrictions apply. *Cunningham v. Municipality of Metropolitan Seattle* (W.D. Wa. 1990) 715 F. Supp. 885, 889-890 (for purposes of analyzing whether an entity empowered to operate a mass transit system and pollution abatement facilities conducted a "governmental function," the court held that in "determining whether an entity has 'governmental powers,' it is necessary to evaluate not

only powers that the entity has actually exercised but also those that the entity possesses but has not yet exercised.”).

Further, when a government entity, through contract or delegation, transfers its lawfully delegable duties to another entity, even a private corporation, that entity is required to comply with the same laws applicable to the government entity itself. See, *International Longshoremen’s, etc., supra*, 69 Cal.App.4th at 297-298 (where a community redevelopment agency contracted with a non-profit corporation to administer housing activities, the non-profit corporation was required to comply with the open meeting laws, public bidding and prevailing wage statutes applicable to the community redevelopment agency).

Other Charter provisions that would need to be repealed to clarify that the neighborhood councils are purely advisory, with no delegated duties, include Sections 909 (giving neighborhood councils the express authority to present an annual list of budget priorities) and Section 910 (which uses the word “shall” and therefore may be interpreted as requiring neighborhood councils to perform the duty of monitoring City services, a task that arguably is the responsibility of the City). Additionally, to the extent that an effort to detach neighborhood councils from the Brown Act requires Council to transfer any power, duty or function of DONE to any other department, office or agency pursuant to Section 514 of the Charter, no such transfer may be accomplished without a Charter change until at least May 30, 2006. The reason is that Section 913 of the Charter prohibits a change in DONE’s powers, duties and functions for the first five years after implementation of the Plan. The Plan was adopted on May 30, 2001, the earliest date on which implementation could have begun. L.A. Charter § 913.

To change the City Charter, the City Council would be required to comply with the election process established by the California Constitution (Article XI, Sections 3 and 5), the California Elections Code (Sections 9255, *et seq.*) and Government Code Section 34458. These laws enable the City to submit the proposed charter amendments to the voters at either a special election or a regularly scheduled election with at least eighty-eight days of notice.

Certain provisions of the Plan passed through ordinance and which may be amended by ordinance, may also require revision. At a minimum, the provision requiring neighborhood councils, as a condition to certification, to provide in their bylaws that they will comply with the Brown Act, should be eliminated. Plan Art. III, § 2(c)(iii)((2). Also, the funding provision of the Plan that grants discretion to each neighborhood council to designate, with the approval of DONE, that all or part of the funds it received may be used for certain neighborhood improvement projects would have to be repealed. Plan Art. VIII, § 1.

This office suggests that if the Council decides to make a significant change to the neighborhood council system, that an advisory opinion be sought from the State Attorney General to confirm that neighborhood councils -- reconstituted as non-profit corporations with the proposed Charter and ordinance amendments discussed above -- would be exempt from the Brown Act under Section 54952(c).³

It should also be noted that tax regulations on 501(c) corporations may limit the lobbying activities of neighborhood councils. This limitation should be explored before any action is taken to change the neighborhood council system.

B. Sponsoring A Legislative Exemption To The Brown Act For Neighborhood Councils

Perhaps a more feasible route the City may pursue if it wishes to change the application of the Act to neighborhood councils, is an amendment to the Act itself or other legislation to accomplish the same purpose.

Models for exempting entities from the Brown Act can be found in the legislative treatment of school advisory councils and committees formed under Education Code Sections 52012 (School Improvement Program involved in disbursement of funds for school operation and performance), 52065 (the American Indian Early Childhood Education Program), 52176 (the Chacon-Moscone Bilingual-Bicultural Education Act of 1976), 52852 (the School-Based Program Coordination Act, designed to coordinate categorical aid programs), 54425 (the McAteer Act, dealing with compensatory education programs for disadvantaged students), 54724 (the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act), and 11503 (Programs to Encourage Parental Involvement), as well as Title 20 U.S.C., Section 7421 (the Federal Indian Education Program). Cal.Educ.Code § 35147.

These advisory councils and committees resulted from statutes establishing programs that provided a significant source of funding. The enabling statutes required schools participating in the funding programs to establish school site councils or advisory committees to assist in the administration of the program's substantial funding. Hence, they serve a function for schools similar to the advisory role originally envisioned for neighborhood councils. L.A. Charter § 900.

³ Advisory opinions by the State Attorney General are afforded great weight but are not binding on a court. *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751-752. *Moore v. Panish* (1982) 32 Cal.3d 535, 544; *Farron* (1989) 216 Cal.App.3d 1071, 1076.

IV. Replacement Safeguards Ensuring Neighborhood Councils Remain Open And Inclusive Should Be A Part Of Any Effort To Create A Brown Act Exemption

The City's original vision for neighborhood councils included a requirement that neighborhood councils conduct their operations inclusively and transparently. L.A. Charter §§ 904(g) and 906(a)(6). The Charter states that certification for a neighborhood council was conditional on a guarantee that "all meetings will be open and public, and permit, to the extent feasible, every stakeholder to participate in the conduct of business, deliberation and decision-making." L.A. Charter § 906(a)(6).

The City should continue to require that neighborhood councils work inclusively and openly. This requirement will continue to ensure the integrity of the input the City receives from the neighborhood councils.

Additionally, the City's effort to secure an exception for neighborhood councils is more likely to be successful if the City continues to require rules amounting to a Brown Act substitute promoting open neighborhood council meetings. By imposing substitute "open government" requirements on neighborhood councils, the City will also fulfill the intent of the Charter framers and ensure that the advice received from the neighborhood councils retains the integrity of recommendations formed in a transparent and inclusive environment.

The educational councils listed in Section III. B. above, are exempted from the Brown Act, but are subjected to more generalized, easily administered open meeting mandates:

[A]ny meeting of the councils or committees specified in subdivision (b) is exempt from . . . the Ralph M. Brown Act. [¶]
(b) The councils and school site advisory committees established pursuant to Sections 52012, 52065, 52176, and 52752, subdivision (b) of Section 54425, Sections 5444.2, 54724, and 62002.5, and committees formed pursuant to Section 11503 or Section 2604 of Title 25 of the United States Code, are subject to this section. [¶] Any meeting held by a council or committee specified in subdivision (b) shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee. Notice of the meeting shall be posted at the school site, or other appropriate place accessible to the public, at least 72 hours before the time set for the meeting. The notice

shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon. The council or committee may not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda”

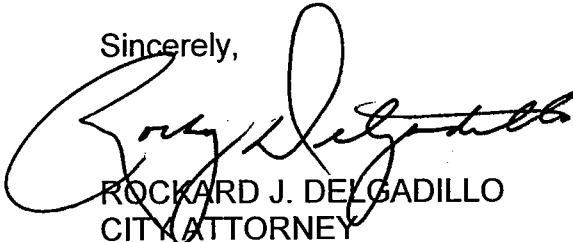
Cal.Educ.Code § 35147

A similar mandate should continue to apply to neighborhood councils.

CONCLUSION

The Brown Act is currently applicable to neighborhood councils because the system was created by legislative action. In order to be exempt from the Act, neighborhood councils would have to be restructured, through changes to the Charter and City ordinances, allowing them to voluntarily reconstitute as non-profit corporations. Alternatively, the Council could pursue a legislative exemption for neighborhood councils similar to existing exemptions for school advisory committees. If neighborhood councils are exempted from the Brown Act, substitute “open government” provisions should be established to ensure the continued openness and transparency of neighborhood council operations.

Sincerely,



ROCKARD J. DELGADILLO
CITY ATTORNEY

RJD:VF:lee

cc: The Honorable James K. Hahn, Mayor
Department of Neighborhood Empowerment
LeeAnn Pelham, Executive Director, Ethics Commission