


		<h2>Your Legal Powers & Obligations</h2> <p>Planning Commissioners Academy</p> <p>Claire Lai Emma Soichet</p>		
				
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Presentation Overview	
<ul style="list-style-type: none"> • I. Role of Planning Commission <ul style="list-style-type: none"> A. State Planning and Zoning Law B. Commission Powers and Duties C. Decision Making Powers D. At the Public Hearing • II. Conducting a Public Meeting & Hearing <ul style="list-style-type: none"> A. Brown Act B. Due Process <ul style="list-style-type: none"> 1. Right to a Fair and Impartial Tribunal 2. Meaningful Opportunity to be Heard 3. Ex Parte Contacts • III. Other Government Transparency Laws <ul style="list-style-type: none"> A. Public Records Act B. Economic Interest Disclosure under the Political Reform Act 	<ul style="list-style-type: none"> • IV. Ethics & Conflicts of Interest <ul style="list-style-type: none"> A. Conflicts of Interest under Political Reform Act B. Contractual Conflicts of Interest C. Limitations on Receipt of Gifts D. Honoraria Ban <div>  </div>

I. Role of Planning Commission

State Planning and Zoning Law

- State law sets forth planning and zoning duties
- Authorizes a city's legislative body to create a Planning Commission or serve directly in that role
- Almost all jurisdictions create separate Planning Commissions
 - City Council assigns review roles to the commission

I. Role of Planning Commission

Commission Powers and Duties

- Advise City Council on:
 - Land use planning
 - General/specific plan, and zoning code amendments
 - Variances
 - General plan consistency determinations
 - Subdivision
 - Historic Resources
 - CEQA
 - Use Permits
 - Design Review

I. Role of Planning Commission

Decision Making Powers

- **Legislative**
 - Ex: recommendations on changes to GP, SP, and zoning
- **Adjudicative or quasi-judicial**
 - Ex: applying the zoning ordinance to a permit application/variances in a use permit hearing
- State law requires public hearing before planning actions are taken

I. Role of Planning Commission

At the Public Hearing...

- **“Findings”**
 - Statements of fact; explains basis for PC decision
 - Specific findings may be required by state or local code
- **“Conditions of Approval”**
 - Reasonable conditions necessary to ensure compliance (i.e. use permits)
- **Due Process**
 - Notice and opportunity to be heard
 - Fair and impartial hearing

II. Conducting a Public Meeting & Hearing

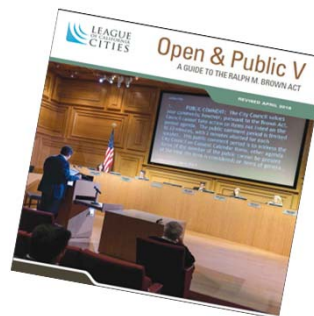
Two main legal considerations in conducting a meeting:

- A. Brown Act
- B. Due Process



II. Conducting a Public Meeting & Hearing

Ralph M. Brown Act *Government Code sections 54950 et seq.*



II. Conducting a Public Meeting & Hearing

A. Brown Act

Open Meeting Requirements

- Meetings...
- Of Legislative Bodies...
- *Shall be open and public*



II. Conducting a Public Meeting & Hearing

Legislative Bodies

What is a legislative body?

Governing
body

Appointed
body

Standing
committee

What is not a legislative body?

Ad hoc
committee if
comprised
of less than a
quorum

II. Conducting a Public Meeting & Hearing

A. Brown Act Definition of “Meetings”

A congregation of a majority of members at the same time and place to hear, discuss, or deliberate on an item of business within the agency’s subject matter jurisdiction.



II. Conducting a Public Meeting & Hearing

A. Brown Act Definition of “Meetings”

Exceptions:

- | | |
|-----------------------------------|--|
| – Conferences* | – Individual contacts |
| – Open community meetings* | – Standing committees (open and noticed) |
| – Social or ceremonial occasions* | – Meetings of other legislative bodies* |



And . . .
Closed Sessions

**Provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, agency business.*

Question #1

- **May some or all commissioners show up at the following events together?**
 - City Council meeting?
 - Community meeting hosted by wireless carrier?
 - Local meeting of the Environmental Action Coalition?
 - Briefing with planning staff before meeting?
 - Planning department staff holiday reception?
 - League of California Cities Conference?

Answer #1

- City Council meeting? **Yes**
- Community meeting hosted by wireless carrier? **Depends**
- Local meeting of the Environmental Action Coalition? **Yes**
- Briefing with planning staff before meeting? **No quorum**
- Planning department staff holiday reception? **Yes**
- League of California Cities Conference? **Yes**

Even if yes, a majority of the members may not discuss among themselves, other than as part of the scheduled program, city business!

II. Conducting a Public Meeting & Hearing

A. Brown Act— Avoiding “Serial Meetings”

- Outside a noticed and public meeting, a majority of the board may not discuss, deliberate, or take action by direct communication, intermediaries, or technology.
 - Does not prevent employees and officials from engaging in separate conversations outside of a meeting provided that the comments or positions of other members are not communicated



II. Conducting a Public Meeting & Hearing

A. Brown Act—Avoiding “Serial Meetings”

Examples

Hub and spoke

- A staff member (the hub) communicates with commissioners (the spokes) one-by-one for input on a proposed action and in the process reveals commissioners’ position to other members in advance of the meeting.

Daisy chain

- Member A contacts Member B, Member B contacts Member C, Member C contacts Member D . . . until a quorum has discussed, deliberated or taken action on an item within the body’s subject matter jurisdiction.



II. Conducting a Public Meeting & Hearing

A. Brown Act—Avoiding “Serial Meetings”

Examples

Emails

- Informal nature of email communication is ripe for inadvertent Brown Act violations

Texts and social media platforms

- Technological devices and platforms may serve to allow for a majority of members to discuss, deliberate, or take action on matters before them.



Question #2

- A Planning Commissioner e-mails a newspaper article pertaining to an upcoming use permit application listed on the agenda next week to the other 6 members.
- The commissioner indicates that she is against the application based on the article and three members *reply all* to the group stating that they disagree, but the information was very helpful.



Was this a Brown Act violation?

Answer #2

- Yes, the commissioners have participated in a discussion of an item within the jurisdiction of the body that was not noticed, open or public.

II. Conducting a Public Meeting & Hearing

A. Brown Act

Video Teleconferencing

- Agenda posted at all locations, with teleconference locations specifically identified
- All locations open to the public with public participation possible at each location
- At least quorum of commissioners must participate from locations within city boundaries
- Roll call votes only



Question #3

- Can a commissioner join a meeting by phone from:
 - Her car?
 - Her home?
 - A cruise ship?
 - Her hotel room?
 - Her family's cabin in Montana?



Answer #3

Depends!

Notice + Posted + Address + Public Participation

- Her car?
- Her home?
- A cruise ship?
- Her hotel room?
- Her family's cabin in Montana?

Question #4

May the Planning Commission and the Design Review Board jointly attend a tour of a new apartment complex within the City's boundaries that was recently reviewed by both and approved by the Commission?



Answer #4



Yes, provided the tour is noticed as a joint meeting of the PC and DRB, and any members of the public who wish to join may come along on the tour.

II. Conducting a Public Meeting & Hearing

A. Brown Act

*May take action only
on items on posted agenda*



- Posting requirements:
 - **Regular meetings:** 72 hours before meeting
 - **Special meetings:** 24 hours before meeting
- **Exceptions**
 - Emergency
 - Urgency: the need for immediate action came to agency's attention after posting the agenda

II. Conducting a Public Meeting & Hearing



II. Conducting a Public Meeting & Hearing

A. Brown Act

Meeting Decorum

- Planning Commission represents City to citizens, developers, and the general public.
- Public must be able to participate at every meeting.



II. Conducting a Public Meeting & Hearing

A. Brown Act

Public Participation Rights

- Regular meetings must provide an opportunity for the public to speak regarding any matter within the commission's jurisdiction
 - Commission may briefly discuss these items and refer matters to staff, **but cannot take action**
- Public can address commission on matters on the agenda before or during consideration of the item



Question #5

- During public comment for items not listed on the agenda, a speaker requested that the Planning Commission discuss whether a mixed-use project downtown provided sufficient traffic data to answer nearby neighbors' questions about potential traffic impacts.
- The Commission voted to decide that there wasn't enough traffic data and that they would not approve the permits requested unless such data are provided at the next meeting.



Is this a Brown Act violation?

Answer #5

Yes, the Commission has taken action on an item that was not noticed on the agenda. Before taking action, the Commission should have directed staff to put the item on the agenda for a future Commission meeting for consideration/action.

II. Conducting a Public Meeting & Hearing

A. Brown Act

Public Participation Rights

- Comment opportunity on agenda items must occur either before or during consideration by the commission, but before action.
- May not limit “negative” comments.



II. Conducting a Public Meeting & Hearing

A. Brown Act

Public Participation Rights

- If commissioners fail to pay attention during an administrative hearing, it may result in a deprivation of “due process.”
 - *Lacy Street Hospitality Services, Inc. v. City of Los Angeles* (2004) 125 Cal.App.4th 526
 - Method of conducting the hearing contribute to the process of conducting a fair hearing.

II. Conducting a Public Meeting & Hearing

A. Brown Act

Public Participation Rights



Question #6

A controversial 1,000-unit housing development project is scheduled for a Planning Commission hearing tonight. About 130 people show up to the meeting ready to voice their objections.

May the Commission limit comments to only the first 50 people?



Answer #6

No. Members of the public must be allowed to speak if they desire to do so at a public meeting. The Commission has some discretion to impose a reasonable time limit (i.e. 2-3 minutes), but may not provide only some members of the public an opportunity to speak.



Question #7

At that same meeting, over half of the 130 public commenters refused to fill out a speaker card, or to provide their names. Typically, the Commission Clerk asks speakers to fill out a speaker card.

May those individuals still provide public comments?



Answer #7

Yes. The Commission may request, but not require, members of the public to provide their name or fill out any informational cards as a condition to provide comments at an open meeting.

Question #8

At that same meeting, several speakers were very agitated when giving their public comment at the podium. Two people began to protest very loudly in their seats and refuse to sit down.

Could any of these individuals be removed from the meeting?



Answer #8

Standards for removing individuals from public meetings are **very high**. Commission may only remove an individual if they are **actually disrupting** a meeting.

- More than a bare violation of a rule of decorum
- Use of profanity alone is insufficient
- Effect on the “audience”, not commissioners

II. Conducting a Public Meeting & Hearing

A. Brown Act

Consequences of Violation

- Nullification of a decision made in violation of the Brown Act's requirements;
- Criminal penalties;
- A possible award of attorneys' fees to the party successfully bringing a Brown Act lawsuit;
- Loss of public confidence.

II. Conducting a Public Meeting & Hearing

B. Due Process Considerations

When a planning commission acts in a quasi-judicial role, it is subject to procedural due process requirements.

- You, as a commissioner, are responsible for ensuring fairness in the procedure
- “Procedural due process” means:
 - A fair and impartial decision maker
 - Notice and meaningful opportunity to be heard



II. Conducting a Public Meeting & Hearing

1. Right to a Fair and Impartial Tribunal

- Right to a hearing before an unbiased officer
- **Elements:**
 - A public officer...
 - Must exercise the powers conferred on him or her with disinterested skill, zeal, and diligence, and primarily for the benefit of the public

II. Conducting a Public Meeting & Hearing

1. Right to a Fair and Impartial Tribunal

- What is bias?
 - Personal or pecuniary interests
 - Predetermined decision

!! Bias disqualifies one from participating

Question #9

- A proposed development has sparked significant controversy in town.
- Planning Commissioner Clark Kent writes an anonymous op-ed opposing the project that is published in the *Daily Planet*.



*Can Kent participate
in a hearing on the
project?*

Answer #9



Kent has demonstrated via his op-ed that he has made a predetermined decision on the project. He must recuse himself.

Question #10

- Instead of writing an op-ed himself, Commissioner Kent decides to re-tweet a newsletter by the Krypton Institute sharply criticizing the project.
- The only comment Kent adds is "Pow! Radiation alert!! Thursday's meeting should be interesting."



- *May Kent participate in a hearing on the project?*

Answer #10

- *Yes, but he should tread carefully.*
- Re-tweeting the article could be seen as proof he has already made up his mind on the project.
- Also, the article may not be in the record.
- Staff or counsel should speak with Kent before the hearing to determine how to proceed.

II. Conducting a Public Meeting & Hearing

2. Meaningful Opportunity to be Heard

- Each party has right to present evidence on a relatively equal playing field.
- **NOTE:** Also means commissioners must pay attention
 - “He who decides must hear”
 - No distractions
 - No private conversations
 - No texting or emailing (Brown Act concerns, too)

II. Conducting a Public Meeting & Hearing

3. Ex Parte Contacts

- Generally, relying on evidence not in the administrative record (e.g., collected by hearing officer on her own) violates due process
- Land use presents a unique situation and exception
 - Disclosure is key
- **CHECK LOCAL RULES** for your city's rules and procedures regarding ex parte contacts

II. Conducting a Public Meeting & Hearing

3. Ex Parte Contacts

- *What is an ex parte contact?*
 - Communication with public, involved party
 - Site visit (e.g., driving by property)
- *What does disclosure entail?*
 - On the record
 - Substantive description

Question # 11

- Commissioner Tenderfoot is new to the commission and has limited experience with planning laws and controversies.
 - Shrewd Industries, the city's preeminent developer, would like to meet with Tenderfoot to educate him on development issues in the city.
- *May he meet with Shrewd?*
 - *If so, does he need to disclose the meeting?*

Answer # 11

- **Yes.** So long as the discussion is limited to general issues (and not a particular project), Tenderfoot may meet with Shrewd and without needing to disclose the contact.

Question # 12

- Planning Commissioner Compromise wants to find workable solutions on controversial projects.
 - A local activist group wants to meet with Compromise to discuss a major housing project before the Commission that is certain to receive opposition.
- *May Compromise meet with the group?*

Answer # 12

- *Maybe.* Commissioner Compromise should check with staff and city attorney about her city's rules for ex parte contacts with the public. If allowed, she will need to disclose whom she met with and what was discussed.

III. Government Transparency Laws

In addition to the Brown Act:

- A. Public Records Act
- B. Economic interest disclosure under the Political Reform Act



III. Government Transparency Laws

A. Public Records Act

Basic Rule

- All non-exempt, state and local government agency records in any form or medium are subject to public inspection during office hours or copying upon payment of duplication costs

Record
defined
broadly

- Any tangible thing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

III. Government Transparency Laws

A. Public Records Act

Disclose or Withhold?

- Withholdings must be supported by an **exemption**
 - Agencies are required to assist the public to identify, locate, and access records.
- Anyone can sue to enforce the right to inspect or receive records.
 - A prevailing party will recover its court costs and reasonable attorneys' fees.
 - Improper disclosure of records involving privacy rights may create liability.



Question #13

- Before a meeting, two Planning Commissioners separately exchanged emails with the Planning Director about an appeal filed by an opponent to a development project for which the Commission has approved a CUP. The commissioners sent these emails using their private Gmail accounts, which they occasionally use for City business.
- A member of the public asks the City for all emails between the two Councilmembers and the Planning Director.



How should the City respond?

Answer #13

- The City must provide the emails. The Supreme Court has decided that emails about public business exchanged between private email addresses on private devices are public records. (*City of San Jose v. Superior Court*)
- Note: If the emails involve discussions with the City Attorney's Office, such contents may be exempt from disclosure under the Attorney-Client Privilege exemption.

II. Government Transparency Laws

A. Economic Interest Disclosure

Under the Political Reform Act

- A Form 700 must be filed by enumerated public officials including those listed in an agency's Conflict of Interest Code
- Filed upon taking office, leaving office, and on an annual basis
- Requires disclosure of personal financial interests



It's a public document!

IV. Ethics & Conflicts of Interest

- A. Conflicts of Interest under the Political Reform Act (PRA)
- B. Contractual Conflicts of Interest (Gov't Code § 1090)
- C. Gifts
- D. Honoraria



IV. Ethics & Conflicts of Interest

A. Conflicts of Interest under PRA

Basic Rule

- Public officials* have a disqualifying conflict of interest under the Political Reform Act of 1974 when a decision has a:
 - Reasonably foreseeable material financial effect on an official's economic interest
 - Different from the effect on the public generally

* For purposes of this rule, a "Public Official" is every member, officer, employee or consultant of a state or local government agency



IV. Ethics & Conflicts of Interest

What is an “Economic Interest” under the PRA?



- \$ Business investments of \$2,000 or more
- \$ Business management positions or employment in for-profit entities
- \$ Real property interests of \$2,000 or more
- \$ Sources of income of \$500 or more (within previous 12 months)
- \$ Sources of gifts of \$500 or more (within previous 12 months)
- \$ Personal financial effects or finances

IV. Ethics & Conflicts of Interest

How do you determine if the “Economic Interest” qualifies as a Conflicts of Interest under PRA?

Four-Part Test

4: Is the official “making, participating in the making, or using his or her position to influence” the governmental decision from which the financial effects result?

3: Is the effect on the official the same as on the “public generally”?

2: Is it material?

1: Is the financial effect “reasonably foreseeable”?



IV. Ethics & Conflicts of Interest

A. Conflicts of Interest under PRA: Common issues

- *Real property & 1,000 foot rule*
 - Decision is presumed to have a material impact on your interests if you own property nearby
- *Sources of Income*
 - Clients are sources of income (e.g., architect with developer client)

IV. Ethics & Conflicts of Interest

A. Conflicts of Interest under PRA: Recusal

- Public official with a disqualifying interest must:
 - Publicly identify interest in sufficient detail
 - Recuse self from discussions or acting on matter
 - Leave room, unless matter on consent agenda

Exception

May speak during public comment on certain personal interests.

IV. Ethics & Conflicts of Interest

B. Conflicts of Interest in Contracts

Basic Rule (Gov't Code section 1090)

- Prohibits public officials and employees from having financial interests...
- In *contracts*...
- Made by them in their official capacities

Applies Broadly

- Applies to renewals, extensions, and oral contracts
- Financial interests in contracts are broadly construed

IV. Ethics & Conflicts of Interest

B. Conflicts of Interest in Contracts

Remote Interest & Non-Interest Exceptions

- *Remote*: Official does not have an interest in a contract if the interest is “remote,” the interest is disclosed to the legislative body and noted in official records, and the official does not vote. (Applies only to multi-member bodies.)
- *Non-Interest*: Official is deemed not interested and may participate in making of the contract



Question # 14

- Boris Badenov owns a vacant lot and has applied to re-designate and rezone the property as part of his plan to develop a mixed use, co-working space and luxury condo project called Nogoodnik Tower.
- Planning Commissioner Natasha Fatale operates a café, Femme Fatale, one block from the property.

*Can Fatale
participate in the
hearing on
Nogoodnik
Tower?*

Answer # 14

- **Likely not.** Even if her café is not the subject of the application, Commissioner Fatale likely has a conflict of interest if the cafe is within 1,000 feet of Boris's property.

Question # 15

- Commissioner Chill owns and operates the city's only cannabis retail store, The Green New Deal.
- The commission is set to hear an application for a use permit for a new cannabis outlet, Where the Grass is Greener, on the other side of town.

*Can Chill
participate in
the hearing?*

Answer to Question # 15

- **Likely not.** Commissioner Chill would have a disqualifying interest in the use permit if the store “may result” in a decrease of gross annual revenues at The Green New Deal of 5% or more (at least \$10,000).

IV. Ethics & Conflicts of Interest

C. Gifts

Basic Rule

- Gift Limit Prohibition:
 - ✓ Public officials and employees...
 - ✓ May not accept...
 - ✓ Gifts...
 - ✓ From a single source...
 - ✓ During a calendar year...
 - ✓ In excess of \$500.

CAUTION

- Gifts received in excess of \$50 from a single source in a calendar year must be reported
- Public Officials may not accept a gift in excess of \$500 from a single source in a calendar year.

IV. Ethics & Conflicts of Interest

C. Gifts

What is a Gift?

- Anything of value that provides a personal benefit for which the donor does not receive equivalent consideration



Includes rebates or discounts
unless given in the regular course
of business to members of the public

IV. Ethics & Conflicts of Interest

C. Gifts

Numerous Exceptions to Gift Rule

- Gifts returned or donated to charity (no tax deduction)
 - Gifts from family members or long-term, personal friends
 - Reciprocal exchanges in a social relationship
 - Informational material
 - Benefits received as a guest attending a wedding
 - Entrance to an event while performing a ceremonial role
 - Personalized plaques or trophies valued at less than \$250
 - Bona fide date or dating relationship
 - Acts of human compassion or neighborliness
- (These are just some examples!)*

IV. Ethics & Conflicts of Interest

D. Honoraria Ban

Basic Rule

Elected officials, general managers, and the district's attorney, may not accept any payment for:

- Giving a speech,
- Publishing an article, or
- Attending a public or private conference, convention, meeting, social event, meal, or similar gathering.

➤ *Several exceptions (e.g., bona fide business)*



Question # 16

Your neighbor is the city's most active developer. She is going on vacation and offers you two tickets to a Warriors game, each with a \$200 face value.



May you accept the gift?

Answer # 16

- **Yes**, the combined value of the tickets is less than \$500. Assuming she has not given you any other gifts such that you have received more than \$500 from her in the calendar year, you can accept the tickets. However, as the gift is in excess of \$50, you will need to disclose the gift.
- Because the gift is under \$500, it will not create a disqualifying interest under the PRA.

Questions?

- Online reference materials (Public Records Act and Brown Act):



- FPPC (for ethics and conflicts issues):
 - **Toll-free advice line: 1 (866) ASK-FPPC;**
 - **Email advice: advice@fppc.ca.gov**

Presenters



Claire Lai

Associate
clai@meyersnave.com



Emma Soichet

Of Counsel
esoichet@meyersnave.com



Oakland Office

555 12th Street, Suite 1500
Oakland, CA 94607
(800) 464-3559